Supreme Court, U.S.
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No. 86-270 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX II

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PETITION FOR CERTIORARI FILED AUGUST 19, 1986
CERTIORARI GRANTED OCTOBER 20, 1986

File Date: September 20, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Plaintiffs' Answer to Counterclaims

Plaintiffs *INTERNATIONAL OLYMPIC COMMITTEE* and *UNITED STATES OLYMPIC COMMITTEE*, and each of them, hereby answer the purported counterclaims filed herein on August 27, 1982 at pages 9 through 14 of defendants' answer and admit, deny and aver as follows:

1. Plaintiffs admit the allegations of paragraphs 1 and 4.

2. Plaintiffs admit the allegations of the first sentence of paragraph 2; except as so admitted, plaintiffs lack information or belief sufficient to enable them to respond to the remaining allegations of paragraph 2 and on that ground deny said allegations.

3. Answering paragraph 3, plaintiffs admit that SFAA, Waddell and others designed, promoted, staged and organized the Gay Games of 1982 and used "Olympic" in connection with those games; except as so admitted, plaintiffs lack information or belief sufficient to enable them to respond to the remaining allegations of paragraph 3 and on that ground deny said allegations.

4. Plaintiffs deny the allegations of paragraphs 5, 6, 10, 11, 14, 15, 18 and 20.

5. Answering paragraph 7, plaintiffs admit that USOC has received financial assistance from the United States Government; except as so admitted, plaintiffs deny the remaining allegations of paragraph 7.

6. Answering paragraph 8, plaintiffs admit that there are plans for certain publicly owned facilities in the State of

California to be used in connection with the 1984 Olympic Games; except as so admitted, plaintiffs deny the remaining allegations of paragraph 8.

7. Answering paragraph 9, plaintiffs admit that one of their counsel stated to a television news reporter that defendant SFAA was not a group suitable for use of Olympic terminology and symbols because SFAA's program did not comply with the requirements and needs of plaintiffs; except as so admitted, plaintiffs deny the remaining allegations of paragraph 9.

8. Answering paragraphs 12 and 13, plaintiffs admit that "Olympic" is of ancient origin and has been widely used in many places for a variety of purposes including athletic performances and competitions; except as so admitted, plaintiffs deny the remaining allegations of paragraphs 12 and 13.

9. Plaintiffs admit the allegations of the first sentence of paragraph 16; except as so admitted, plaintiffs deny the remainng allegations of paragraph 16.

10 Answering paragraphs 17 and 19, plaintiffs reallege and incorporate herein their responses to paragraphs 1 through 16, inclusive.

11. Plaintiffs deny that defendants have been injured in any amount or at all as a result of any act or wrongdoing of plaintiffs.

12. Plaintiffs deny each and every allegation of the counterclaims not expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

The counterclaims fail to state a claim upon which relief can be granted against plaintiffs, or either of them.

SECOND AFFIRMATIVE DEFENSE

The counterclaims and the relief prayed for therein are barred in that the award of such relief would be contrary to the Amateur Sports Act of 1978 (36 U.S.C. § 371, et seq.).

THIRD AFFIRMATIVE DEFENSE

The counterclaims and the relief prayed for therein are barred by the unclean hands of defendants in that defendants agreed to refrain from use of Olympic terminology and symbols in connection with the Gay Games of 1982 but thereafter violated that agreement.

FOURTH AFFIRMATIVE DEFENSE

Defendants lack standing to challenge the constitutionality of 36 U.S.C. § 380 or any other provision of the Amateur Sports Act of 1978 (36 U.S.C. § 371, et seq.)

FIFTH AFFIRMATIVE DEFENSE

The counterclaims and the relief prayed for therein are barred by laches in that defendants failed promply to raise the claims purportedly stated in the counterclaims and plaintiffs relied to their detriment upon defendants' failure to assert such claims.

Wherefore, plaintiffs pray for judgment on defendants' counterclaims as follows:

1. Defendants take nothing by reason of their purported counterclaims;
2. Judgment be entered in favor of plaintiffs, and against defendants on the purported counterclaims and said counterclaims be dismissed with prejudice.
3. For costs incurred by plaintiffs in this action including plaintiffs' reasonable attorneys' fees; and
4. Such other and further relief that the court may deem fair and proper.

Dated: September 20, 1982

Vaughn R. Walker (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Names omitted, See J.A. 5, above.)

File Date: February 9, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Answers to Defendants' First Set of Interrogatories

Plaintiffs hereby respond to Defendants' First Set of Interrogatories ("Interrogatories") dated November 4, 1982 as follows:

GENERAL OBJECTION

Plaintiffs object to defendants' Interrogatories insofar as they request disclosure of information or documents consisting of the work product of plaintiffs' attorneys or communications subject to the attorney-client privilege.

GENERAL RESERVATIONS OF RIGHTS

All answers are accurate to the best of plaintiffs' present knowldge and belief but in the event further proceedings or investigation should indicate any respect in which any answer needs to be supplemented or modified, plaintiffs reserve the right to serve and file supplemental answers for such purpose.

Any statement made in response to Defendants' Interrogatories shall be without prejudice to plaintiffs' right to object to the admission in evidence or relevance of such information or documentation or its right to object to further discovery of information or documentation relating to the same subject matter upon any valid ground or grounds including without limitation privilege, work product, lack of relevance, lack of materiality, overbreadth, burdensomeness, oppressiveness or incompetence.

Interrogatory 1. Please state each of the ways, if any, in which USOC has acted to promote amateur athletic opportunities and activities for each of the below-designated groups:

a. racial and ethnic minorities;
b. females;
c. persons under the age of 18 years;
d. persons over the age of 35 years;
e. economically disadvantaged (e.g. low-income persons);
f. gay males and lesbians.

Answer The United States Olympic Committee is prohibited by its charter from discriminating against or in favor of any racial, ethnic, religious or other groups of individuals. However, pursuant to its charter mandate to promote the development of amateur sports, with attention to groups needing special assistance, the Committee has, for example, authorized use of "Special Olympics" for handicapped individuals.

(a) The Olympic Committee has not discriminated against but welcomes individuals from all racial and ethnic groups to compete for a place on the Olympic team.

(b) The United States Olympic Committee has, for example, supported an increase in the number of events for women in the Olympic Games and other international sports competitions, including previously all-male events such as marathon, cycling and shooting. Moreover, the Olympic Committee has seen that women are represented on all committees of the United States Olympic Committee.

(c) If capable of qualifying, athletes of all ages are eligible to compete for a place on the Olympic team. However, the Olympic Committee, in response to its objectives of promoting amateur sports and developing amateur athletes, has also authorized both the "Junior Olympics" and the "Explorer Olympics" to encourage all youth of the United States to participate in "grass roots" sports programs.

Moreover, almost all national governing bodies have conducted "grass roots" programs in their respective sports, at the United States Olympic Committee's Training Center. These programs are aimed at developing new athletes in those sports, and by their very nature tend to be youth oriented. In addition, the Olympic Committee has allocated development funds to the national governing bodies to expand the basic participation of youth in amateur athletics.

(d) As with young athletes, older athletes are freely able to compete for a place on the Olympic team.

(e) The Olympic Committee makes available to all athletes selected by national governing bodies, its specific training facilities as well as other means of subsidizing the training of qualified athletes. These include at least three specific programs which provide some form of financial support to enable the athletes to train properly:

(i) The Elite Athlete Program". Each national governing body may identify specific athletes that they recognize as being world class potential. Those athletes then are entitled to additional financial support for training.

(ii) "Operation Gold". The Olympic Committee, with the help of the national governing body in each sport, identifies the leading contenders in each sport based on actual world class standing. Those athletes would also be entitled to additional financial support for training.

These two programs have assisted approximately one thousand amateur athletes.

(iii) The "Job Opportunities Program". Leading amateur athletes are given assistance in finding jobs which will accommodate their training schedules, and employers who will be liberal in paid leave policies to permit time away for competition and training.

(f) As stated in the response to Interrogatory 1 (a), the Olympic Committee is prohibited by its charter from discriminating, and welcomes all qualified individuals to try out for the Olympic teams.

Interrogatory 2. Please describe the contents of all rules, policies, guidelines and decisions of IOC and USOC concerning sexual activity by amateur athletes competing for places in the Olympic Games, at any stage of such competitions.

Answer The plaintiffs have no rules, policies, guidelines or decisions concerning sexual orientation by amateur athletes.

Interrogatory 3. Please state your opinion as to whether every use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by any person for the purpose of trade, without the consent of USOC, deceives, tends to confuse or tends to cause mistake by the public as to the relationship of the user or the user's activity with the Olympic Games or the USOC? Please identify all uses for the purpose of trade that, in your opinion, are not in and of themselves deceptive, tending to cause confusion or mistake, referring specifically to each and every such use as to which you had information or belief as of August 9, 1982. Please also specify all facts and inferences upon which you base your opinion in response to this Interrogatory.

Answer It is the contention of the plaintiffs that every use of the terms "Olympic", "Olympics" or "Olympiad" for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition may tend to cause confusion, to causes mistake, to deceive, or to falsely suggest a connection with the International Olympic Committee, the U.S. Olympic Committee or any Olympic activity.

As to what uses may not be deceptive, the plaintiffs are unable to answer speculative or hypothetical questions.

Interrogatory 4. Please state your opinion as to whether every use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by any person to induce the sale of goods, services or goods and services, without the consent of USOC, deceives, tends to confuse, or tends to cause mistake by the public as to the relationship of the user or the user's activity with the Olympic Games or the USOC. Please identify all uses for the purpose of inducing sale of goods/services that, in your opinion, are not in and of themselves deceptive, tending to cause confusion or mistake, referring specifically to each and every such use as to which you had information or belief as of August 9, 1982.

Answer See response to Interrogatory No. 3

Interrogatory 5. Please state your opinion as to whether every use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by any person to promote a theatrical exhibition, athletic performance, or competition, without the consent of the USOC, deceives, tends to confuse or tends to cause mistake by the public as to the relationship of the user or the user's activity with the Olympic Games or the USOC. Please identify all uses for the purposes of promoting a theatrical exhibition, athletic performance, or competition that, in your opinion, are not in and of themselves deceptive, tending to cause confusion or mistake, referring specifically to each and every such use as to which you had information or belief as of August 9, 1982.

Answer See response to Interrogatory No. 3.

Interrogatory 6. Please provide the name and business address of every corporation, organization and every public entity or agency that has contributed, donated or pledged to contribute or donate five hundred dollars ($500.00) or more in money, goods, services or any combination thereof, to plaintiffs or either of them, to assist in supporting, or to pay expenses and costs related to, the 1984 Olympic Games to be held in Los Angeles, California.

Answer Plaintiffs object to Interrogatory No. 6 in that it is over broad and burdensome, in that it is irrelevant and not calculated to lead to discovery of relevant evidence, and further, in that it requests discovery of sensitive, confidential information, the public disclosure of which may tend to injure Plaintiffs in their efforts to solicit contributions from persons, many of whom wish to remain anonymous.

Interrogatory 7. Please provide the name, business address, and an identification of his/her relationship to USOC or IOC or both, as of August 9, 1982, as to each person who voted for and/or consented to the civil action filed by plaintiffs against defendants on August 9, 1982, bearing number C-82-4183 RFP.

Answer The directory of the Administrative Committee of the United States Olympic Committee will be disclosed at the time of document production. The International Olympic Committee responds: S.E.M. Juan Antonio Samaranch, President, International Olympic Committee.

Interrogatory 8. Please state whether IOC holds any ownership interest or other proprietary interest in the U.S. trademarks or service marks, or any of them, that USOC purports to hold as to the words "Olympic", "Olympics", "Olympiad" or any of these words. If the position of the IOC is different in any respect from the position of USOC in response to this Interrogatory, please state the response of each plaintiff separately, identifying each response by its sponsor.

Answer The charter of the International Olympic Committee together with its rules and bylaws, and the charter of the United States Olympic Committee together with its rules and bylaws, and a copy of Section 380 of Title 36, United States Code will be made available at the time of document production.

Interrogatory 9. If the answer of IOC, USOC or either of them to Interrogatory 8, above, is affirmative, please describe the nature and origin of IOC's ownership interest or other proprietary interest in any of said trademarks or service marks, or both.

Answer See response to Interrogatory No. 8.

Interrogatory 10. Please indicate whether any person seeking entry into the Untied States for purposes of participation in athletic events of the Olympic Games has at any time been denied a visa for U.S. visiting or been excluded from entering the United States because of his/her sexual orientation.

Answer The plaintiffs have no knowledge of the exclusion of any person from the United States based upon sexual orientation.

Interrogatory 11. If the answer to Interrogatory 10, above, is affirmative, please indicate the number of persons so denied visas or excluded from U.S. entry, indicating as to each person or number the year of exclusion or denial of visa.

Answer Not applicable.

Interrogatory 12. Do you contend that gay males and lesbians who seek or who have sought to compete for participation in, and to compete in, the athletic events of the Olympic Games have been accorded equal treatment relative to all heterosexual competitors at all times that USOC and IOC have managed and governed the Olympic Games? Please set forth all facts, opinions and inferences upon which you base your answer to this Interrogatory.

Answer The plaintiffs contend that gay males and lesbians who have sought to compete for participation in the athletic events of the Olympic Games have been awarded equal treatment by plaintiffs relative to all heterosexual competitors. The charters of the United States Olympic Committee and of the International Olympic Committee do not recognize discrimination based on sexual orientation.

Interrogatory 13. Do you contend that the uses and intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, by defendants, as alleged in your Complaint filed in this civil action on August 9, 1982, posed a greater risk of deception, or of tendency to cause confusion or to cause mistake as to the relationship of the user(s) and the activities of the user(s), or either of them, to the USOC or the Olympic Games, than the uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by (a) police; (b) firefighters; (c) Armenians; (d) senior citizens; (e) other groups as to whom or which you had information or belief as to uses of any of those terms when you commenced this civil action? If your answer to any subpart(s) of this Interrogatory is affirmative, please provide every fact, opinion and inference upon which you base that answer, as to each comparison group as to which your answer is affirmative. Please answer each subpart of this Interrogatory separately.

Answer The plaintiffs object to Interrogatory No. 13 in that is is irrelevant because: (a) the test for violation of 36 USC § 380 is not comparative but absolute, the test being based upon usages prohibited by the statute without reference to other infringing or non-infringing uses; (b) the interrogatory presumes other uses without basis or even an allegation of the parameters of such use; and, (c) the defendant has not shown or even alleged privity with the hypothetical groups listed in Interrogatory 13, even presupposing such uses.

It is the contention of the United States Olympic Committee that, regardless of whether there are other authorized or unauthorized uses, the defendants' use, particularly in the fashion in which used and promoted, conflicts with the United States Olympic Committee's primary area of responsibility and, therefore, clearly falls within the prohibitions of the statute.

Interrogatory 14. Do you contend in this civil action that the uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, or either of them, prior to issuance of the temporary restraining order in this civil action, caused or threatened to cause any special or distinct harm to you, or to either USOC or IOC, because of the affiliation of defendants with gay males and lesbians, or because of the affiliation of defendants with the cause of overcoming discrimination against lesbians and gay males, or both?

Answer The plaintiffs do not so contend.

Interrogatory 15. If your answer to Interrogatory 14 is affirmative, please specify each form and nature of special or distinct harm to you, or to USOC or IOC, that you contend was caused or was threatened to be caused by the affiliation of defendants with gay males and lesbians, or by the affiliation of defendants with the cause of overcoming discrimination against lesbians and gay males, or both.

Answer Not applicable.

Interrogatory 16. Please state every fact, opinion and inference upon which you base the claim, contained in paragraph 24 of your Complaint filed in this civil action on August 9, 1982, that as of August 9, 1982 "USOC has suffered and will continue to suffer immediate and irreparable injury" unless defendants were enjoined from use of the words "Olympic", "Olympics", "Olympiad" and any of these words.

Answer Through use of "Olympics", Defendants have tended to suggest a connection or association with the International Olympic Committee, the United States Olympic Committee or an Olympic activity, placing that term outside the ability of the plaintiffs to control the goodwill associated therewith. See opinion of Chief Judge Robert Peckham herein, at 12-13.

Interrogatory 17. In your opinion, do gay males and lesbians suffer discrimination as gay males and lesbians in the United States in the matter of amateur athletic opportunities? Please explain the basis of your opinion.

Answer The plaintiffs have no opinion.

Interrogatory 18. Do you claim that IOC has suffered any injury because of the uses or intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, as said uses and intended uses were alleged in your Complaint filed in this civil action?

Answer The plaintiffs do so contend. There is only one authentic Olympic Games, which is open to all athletes from countries with National Olympic Committees.

Interrogatory 19. If your answer to Interrogatory 18, above, is affirmative, please specify and fully describe each injury that IOC has suffered because of the uses and intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, as said uses and intended uses were alleged in your Complaint filed in this civil action.

Answer See response to Interrogatory No. 16.

Interrogatory 20. Do you contend in this civil action that defendants' uses and intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, as said uses and intended uses are alleged in your Complaint filed in this civil action on August 9, 1982, would infringe or violate your purported rights to said terms, or to any of them, if defendants had not charged any admission fees to participants nor to observers of the Gay Games of 1982, and if defendants had not sold any items containing the said terms, or any of them?

Answer The plaintiffs object to Interrogatory No. 20 in that it calls for speculation upon presumed facts which are contrary to the facts of record in this case.

Interrogatory 21. Do you contend that your rights to the use of the terms "Olympic", "Olympics", "Olympiad" and each of these terms include a right to preliminary injunctive relief to prevent any person(s) from using the said terms, or any of them, in any way or for any purpose, whatsoever?

Answer The plaintiffs do not contend that they are entitled to preliminary injunctive relief to prevent "any person" from using Olympic, Olympic, or Olympiad "in any way or for any purpose whatsoever...."

Interrogatory 22. If your answer to Interrogatory 21, above, is negative, please describe the uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms that, in your opinion, do not violate your rights to the use of said terms and that do not entitle you to preliminary injunctive relief to prevent such use(s).

Answer See 36 USC § 380, which contains exceptions to the generally broad prohibition against use of "Olympic", "Olympics" or "Olympiad". One example may be the factual report of an actual event: that is, a news report regarding the Olympic games.

Interrogatory 23. Please specify, by the nature and amount of financial assistance received, the purported purpose(s) of said assistance, the date said assistance was received and the name of each governmental authority that authorized such assistance (i.e. the name of the entity or branch or agency), each and every item of financial assitance that USOC has received at any time(s) from the United States government, the government of the State of California, the government of the City, County and/or City and County of Los Angeles, and/or any other governmental entity or subdivision within the United States.

Answer (a) The United States Olympic Committee has only twice received monies from the United States Government:

1. By amendment to the Amateur Sports Act, Congress authorized payment of ten million dollars to the United States Olympic Committee as compensation for the interference of the United States Government in the affairs of the United States Olympic Committee in prevailing upon the Committee to refrain from sending a representative team to the 1980 Olympics in Moscow.
2. The United States Olympic Committee recently has received 6.3 million dollars from the sale to the public of coins minted by the United States bearing Olympic designations. Those monies stem from a surcharge on the price of those coins, in the nature of a non tax-deductable donation to the Olympic Committee.

(b) The United States Olympic Committee has received some of the same benefits enjoyed by other private corporations in locating facilities in a particular site. This consisted primarily of an inducement by the City of Colorado Springs, Colorado to have the United States Olympic Committee locate its new Olympic Training Center in Colorado Springs. That inducement took the form of a reduced lease on a portion of the land on which the Training Center is located.

It is the contention of the United States Olympic Committee that none of these monies or inducements constituted or were "financial assistance" from a Governmental authority in the nature of a grant, gift, appropriation or subsidization.

Interrogatory 24. Please identify, by address of the facility, name(s) of the entity or entities or agency or agencies who own the facility, and purpose(s) for which the facility has been or is to be used by USOC, each publicly owned facility that USOC has used or has plans to use in conjunction with the Olympic Games at any time(s).

Answer To the extent that the USOC has at any time used public facilities, it has done so at the direction of an Organizing Committee of the Games, which facilities remained at all times under the control of such Organizing Committee.

Interrogatory 25. Please indicate, as to each facility identified in response to Interrogatory 24, whether the use of said facility by USOC has been or will be donated without any monetary charge to USOC for the use of the facility, and the amount of any charge that has been or is to be paid by USOC for use of each such facility.

Answer The USOC has no knowledge of any arrangements.

Interrogatory 26. Please state whether the USOC has the same rights and duties under the U. S. Internal Revenue Code as any other private, non-profit corporation.

Answer The United States Olympic Committee does contend that it operates under the same rights and duties as any other private, non-profit corporation with respect to the United States Internal Revenue Code.

Interrogatory 27. Please state whether the USOC has at any time paid any income taxes to the United Sates, or to the Internal Revenue Service, and please indicate the year of any such payment and the amount of income taxes paid by USOC.

Answer The United States Olympic Committee has not paid income taxes to any such governmental authority.

Interrogatory 28. Please provide the names and business addresses of all persons who are directors, officers or executives of USOC or IOC, or both, as of August 9, 1982.

Answer The directories of the International Olympic

Committee and of the United States Olympic Committee will be made available at the time of document production.

Interrogatory 29. Please state the total amount of assets and revenue including accounts receivable that were possessed by USOC as of each of the following dates: (a) January 1, 1978; (b) January 1, 1980; (c) January 1, 1982; (d) August 9, 1982.

Answer The United States Olympic Committee objects to Interrogatory 29 as irrelevant and not tending to lead to the discovery of relevant evidence; and further, in that public disclosure of such information may tend to injure Plaintiff in its fundraising activities.

Interrogatory 30. Please state the total amount of liabilities including accounts payable that were possessed/owed by USOC as of each of the dates set forth in Interrogatory 29, above.

Answer See response to Interrogatory No. 29.

Interrogatory 31. Please state the total amount of attorneys fees paid by USOC and IOC, or either of them, to any attorney(s) in conjunction with the representation of USOC and IOC, or either of them, in this civil action, as of the date of service of these Interrogatories upon you, specifying the services for which such fees have been paid and the amount per hour that was charged to you.

Answer The plaintiffs object to Interrogatory No. 31 in that it is premature, relating as it does only to the amount of the final judgment to be entered in the action. The plaintiffs will provide such information pursuant to a protective order at such time as it may become relevant.

(Jurats and certificates of service omitted.)

File Date: February 9, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Response to Defendants' Request to Produce Documents

Plaintiffs hereby respond to Defendants' First Set of Requests for Production of Documents to Plaintiffs United States Olympic Committee and International Olympic Committee ("Document Requests") dated November 4, 1982.

GENERAL OBJECTIONS

1. Plaintiffs object to defendants' Document Requests insofar as they request production or disclosure of information or documents consisting of the work product of plaintiffs' attorneys or communications subject to the attorney-client privilege.

2. Plaintiffs object to defendants' Document Request insofar as it requests the production of documents, contrary to Rule 34(b) of the Federal Rules of Civil Procedure in an unreasonable time, place and manner (to wit producing and delivering to defendants' counsel a copy of all documents responsive to said request).

GENERAL RESERVATIONS OF RIGHTS

1. All responses are accurate to the best of plaintiffs' present knowledge and belief but in the event further proceedings or investigation should indicate any respect in which any response needs to be supplemented or modified, plaintiffs reserve the right to serve and file supplemental answers for such purpose.

2. Any statement made in response to defendants' Docu-

ment Request shall be without prejudice to plaintiffs' right to object to the admission in evidence or relevance of such information or documentation or the right to object to further discovery of information or documentation relating to the same subject matter upon any valid ground or grounds, including without limitation privileged work product, lack of relevance, lack of materiality, overbreadth, burdensomeness, oppressiveness or incompetence.

Request No. 1. All documents that contain any reference to any disapproval, of whatever form or character, by IOC, USOC or both IOC and USOC, of any use(s) of the term "Olympic", "Olympics", "Olympiad", or any of those terms, by any person(s), group(s), entity or entities, or organization(s).

Response. See lists of:

(a) correspondence by United States Olympic Committee requesting persons to cease and desist from using relevant Olympic terminology;

(b) *inter partes* administrative proceedings before the United States Patent and Trademark Office regarding applications to register Olympic related marks; and

(c) litigation before various United States District Courts involving Olympic related marks.

(d) files of the International Olympic Committee listing uses of "Olympic" in the United States. Files regarding unauthorized uses outside the United States are not listed as irrelevant.

At a mutually agreeable time and date, actual documents from the files of the United States Olympic Committee will be made available for inspection by defendants at the United States Olympic Committee's offices in Colorado Springs, Colorado, due to the voluminous nature of the files.

The International Olympic Committee maintains its files in Laussanne, Switzerland, and production would be burdensome, and plaintiff therefore objects. However, a portion of particular files may be made available at the offices of plaintiffs' attorney, Vaughn R. Walker, in response to a limited request.

Plaintiff United States Olympic Committee also has documents which evidence disapproval of other unauthorized uses of Olympic related designations such as "Olympian", as well as disapproval of specific uses of Olympic designations by otherwise authorized persons. These have not been produced as not responsive.

Request No. 2. All documents that contain any reference to any use(s) of the terms "Olympic", "Olympics", "Olympiad" or any of those terms, in conjunction with the promotion of any theatrical exhibition, athletic performance, or competition, where such use(s) was/were by any person(s), group(s), entity or entities, or organizations(s) other than you.

Response. Plaintiffs object to Request No. 2 on the grounds that it is overly broad and burdensome. It is not confined to unauthorized uses, as was Request No. 1, and authorized uses are irrelevant to this action.

Request No. 3. All documents containing any reference to defendants, or either of them.

Response. Plaintiffs will produce responsive documents at a mutually convenient time and date at the offices of their attorney Vaughn R. Walker. Plaintiffs have also produced to defendants during proceedings herein on plaintiffs' motions for a temporary restraining order and for a preliminary injunction, numerous other documents in the nature of communications between the parties, publications regarding defendants or their athletic competition, and defendants' own documents.

Privilege is claimed for attorney-client communications and for documents which reflect attorney work product. Plaintiffs will endeavor to assemble a schedule of these documents should it become necessary.

Request No. 4. All documents that contain any reference to any information concerning the Gay Games that were staged in San Francisco, California in 1982, and which are referred to by plaintiffs in their complaint filed in this civil action, at paragraph 6 thereof, on August 9, 1982.

Response. See response to Request No. 3.

Request No. 5. All documents that consist of communications and correspondence, or either, that was/were sent to you by any actual or prospective participant in the Gay Games of 1982, which Gay Games are defined in Request No. 4., above, and which communications and correspondence, or either, contain any reference to the said Gay Games.

Response. The plaintiffs object to this Interrogatory insofar as "prospective participant" may include every individual in the world. The plaintiffs do answer, however, that no documents exist responsive to a request confined to persons known or thought to be potential participants.

Request No. 6. All documents that contain any reference to any athletic competition(s) or performance(s) that have by identified in writing or print by anyone as being "Olympic", "Olympics", an "Olympiad" or any of these terms, and that have been sponsored, organized by, identified with or held for participation by any of the following groups: (a.) a group identified by occupation (e.g. police, firefighters)' (b.) a group identified by ethnicity (e.g. Armenians, Chinese)' (c.) a group identified by age (e.g. persons under 18 years of age, persons over 35 years of age); (d.) a group identified by physical condition (e.g. handicapped or disabled persons, kidney transplant recipients).

Response.(a) See response to Request No. 1.

(b) See response to Request No. 1.

(c) See response to Request No. 1. The United States Olympic Committee objects to this Request both as irrelevant and overly broad and burdensome insofar as it calls for all documents regarding authorized programs, such as "Junior Olympics".

(d) See response to Request No. 1. The United States Olympic Committee objects to this Request as irrelevant and as overly broad and burdensome insofar as it calls for all documents regarding authorized programs such as the

"Special Olympics".

Request No. 7. All documents that contain any reference to the receipt of financial assistance by you from the United States government, as referred to in your "Answer to Counterclaims" filed in this civil action, at paragraph 5 thereof.

Response. (a) The United States Olympic Committee will make available at the offices of its attorney, Vaughn R. Walker, documents regarding compensation by the United States government for injury to the United States Olympic Committee resulting from the boycott of the 1980 Olympic Games.

(b) The United States Olympic Committee will make available at the offices of its attorney, Vaughn R. Walker, documents regarding receipt of monies from the sale of official Olympic coins bearing Olympic designations. The Olympic Committee has as well, voluminous files regarding its efforts in support of Congressional legislation authorizing the minting of coins bearing Olympic designations, which have not been produced as not responsive.

Request No. 8. All documents filed or presented by you to any agency or branch of the United States Government pursuant to Title 36 of the United States Code at section 384 thereof.

Response. No such documents exist.

Request No. 9. All document that contain any reference to the plans for certain publicly owned facililities in the State of California to be used in connection with the 1984 Olympic Games, as referred to by you in your "Answer to Counterclaims" filed in this civil action, at paragraph 6 thereof.

Response. The plaintiffs have no such documents in their possession.

Request No. 10. All documents upon which you base the following statement: " 'Olympic' ...has been used widely in many places for a variety of purposes including athletic performances and competitions" which statement is contained in your "Answer to Counterclaims" files in this civil action, at pargraph 8 thereof.

Response. The plaintiffs object to this Request as overly broad and burdensome, in that it calls for thousands of documents from hundreds of files, without regard to the nature of the use, location of use, or whether authorized or unauthorized. Plaintiffs have already provided a list of known, unauthorized uses in their responses to Request No. 1.

Request No. 11. All documents that contain any reference to any information about the subject of sexual orientation, or to any information concerning the sexual orientation of any person(s), insofar as said document(s) also contain(s) any reference to the participation of one or more persons in any athletic activities.

Response. Plaintiffs will make available at a mutually convenient time and date, at the offices of their attorney Vaugh R. Walker, such responsive documents as may exist.

Request No. 12. All documents that contain any reference to any policy or policies, practice(s), decision(s), rule(s), or guideline(s) of IOC or USOC, or both of them, concerning the subject of sexual orientation, or concerning one or more gay men or one or more lesbians, or both.

Response. No such documents exist.

Request No. 13. All documents that contain any reference to any attitude(s), belief(s), thought(s), practice(s), decision(s), guideline(s) or viewpoint(s) of any officer, manager or executive of USOC or of IOC, including but not limited to F. Don Miller, concerning the subject of sexual orientation or concerning the subject of one or more gay men, or one or more lesbians, or both.

Response. The plaintiffs object to this Request in that the personal beliefs of their members or employees are irrelevant to this action. Nevertheless, all possibly responsive documents have been produced to defendants previously, or will be produced in response to Request No. 11.

Request No. 14. All documents upon which plaintiffs in any part rely or base their claim that the public will be confused, or tend to be confused, or will be deceived, or will be caused to make a mistake, as to the relationship of defendants and/or the Gay Games of 1982, as defined above in Request 4, above, vis à vis you or USOC or the Olympic Games, by use(s) of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, or either of them, which claim is made by you in paragraph 34 of the "Complaint" filed in this civil action of August 9, 1982.

Response. See response to Request No. 3. Additional documents will be produced at the offices of plaintiffs' attorney, Vaughn R. Walker, at a mutually convenient time and date.

Request No. 15. All documents upon which plaintiffs in any part rely or base their claim that the value of plaintiffs' name will be impaired, by the use(s) of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, or either of them, which claim is made by you in paragraph 34 of the "Complaint" filed in this civil action on August 9, 1982.

Response. See response to Request No. 14.

Request No. 16. All documents upon which plaintiffs in any part rely or base their claim that plaintiffs' business reputation and goodwill will be injured by the use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, by defendants, or either of them, which claim is made by you in paragraph 34 of the "Complaint" filed in this civil action on August 9, 1982.

Response. See response to Request No. 14.

Request No. 17. All documents filed by you in any civil suits brought by USOC, or IOC, or both of them, concerning the rights of plaintiffs, or either of them, to use and to prevent or restrain any others(s) from using the terms "Olympic", "Olympics", "Olympiad" or any of these terms, excluding documents filed in this civil action.

Response. Plaintiffs object to Request No. 17 on grounds that it seeks documents which are in the public record and which are as accessible to defendants as they are to plaintiffs, and that the request seeks information not relevant nor calculated to lead to the discovery of relevant evidence insofar as it requests documents regarding different Olympic designations, used in different fashions by unrelated third parties.

Request No. 18. All documents containing any information about the method(s) by which USOC proposes or intends to raise funds for the 1984 Olympic Games to be held in Los Angeles, California.

Response. The United States Olympic Committee does not raise funds for the conduct of the Olympic Games themselves.

Request No. 19. All documents that contain any reference to any claim of an ownership interest or other proprietary interest by plaintiff IOC in the US trademarks and/or service marks held by plaintiff USOC as to or upon the words "Olympic", "Olympics", "Olympiad", or any of these words.

Response. See the I.O.C. and U.S.O.C. charters to be produced at the offices of plaintiffs attorney, Vaughn R. Walker, at a mutually convenient time and date.

Request No. 20. All documents that purport to contain any agreement(s) contract(s), memorandum(s) of understanding or other similar material as, by and between USOC and IOC, concerning any of the following subjects:

(a.) fund raising for the 1984 Olympic Games to be held in Los Angeles, California;

(b.) governance of the 1984 Olympic Games to be held in in Los Angeles, California.

Response. (a) No documents exist.
(b) No documents exist.

Request No. 21. All documents containing any minutes, agendas, transcripts, notes or other materials pertaining to any conference, discussion, meeting or conversation between or among two or more agents of USOC, or of IOC, or of both USOC and IOC, insofar as said documents contain any reference to defendants, or to either of them, or to the Gay Games of 1982, as identified in Request 4, above, or to the decision(s) by you to file this civil action.

Response. See response to Request No. 3.

Request No. 22. A copy of the articles of incorporation, the constitution, the bylaws and any other documents concerning the structure, purposes and/or functions of USOC, including any amendments adopted at any time to said articles, constitution or bylaws.

Response. See response to Request No. 19.

Request No. 23. A copy of the articles of incorporation, the constitution, the bylaws and any other documents concerning the structure, purposes and/or functions of IOC, including any amendments adopted at any time to said articles, constitution or bylaws.

Response. See response to Request No. 19.

Request No. 24. A copy of all financial reports of USOC, including financial statements, statements of assets and liabilities, and income statements, prepared for or in behalf of USOC pursuant to USOC's obligations as a private, non-profit corporation, for each of the years 1976-1982, inclusive.

Response. The United States Olympic Committee will produce responsive documents in the office of its attorney, Vaughn R. Walker, at a mutually convenient time and date.

Request No. 25. A copy of each and every trademark and service mark application ever filed by USOC in the United States, and a copy of every document presented in response to each such aplication by USOC, by the entity or agencyto which application was made, including but not limited to copies of all documents purporting to bestow any trademark or service mark upon USOC, its predecessors, successors or agents.

Response. Copies of five registrations and one application will be produced at the offices of plaintiff's attorney, Vaughn R. Walker, at a mutually convenient time and date. The applications and responses which resulted in issuance of those registrations are publicly available documents in the files of the United States Patent and Trademark Office and, as such, are as accessible to defendants as to plaintiffs.

UNITED STATES OLYMPIC COMMITTEE
By: Richard G. Kline (Signed)
(Certificate of service omitted.)

File Date: February 9, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Answers to Defendants' Request for Admissions

Plaintiffs hereby respond to Defendants' Request for Admissions dated November 4, 1982 as follows:

GENERAL RESERVATIONS OF RIGHTS

All answers are accurate to the best of plaintiffs' present knowledge and belief but in the event further proceedings or invetigation should indicate any respect in which any admission or denial needs to be supplemented or modified, plaintiffs reserve the right to serve and file supplemental responses for such purpose.

Any statement made in response to Defendants' Request for Admissions shall be without prejudice to plaintiffs' right to object to the admission in evidence or relevance of such response or its right to object to further discovery of information or documentation relating to the same subject matter upon any valid ground or grounds including without limitation privilege, work product, lack of relevance, lack of materiality, overbreadth, burdensomeness, oppressiveness or incompetence.

1. Plaintiff UNITED STATES OLYMPIC COMMIT-

TEE has received financial assistance from the United States government.

Answer Admitted, in so far as qualified in response to Defendants' Interrogatory No. 23.

2. Plaintiff UNITED STATES OLYMPIC COMMITTEE has plans to use publicly owned facilities located in the State of California in connection with the 1984 Olympic Games.

Answer Admitted, insofar as it may be directed to do so. See response to Defendants' Interrogatory No. 24.

3. Plaintiff UNITED STATES OLYMPIC COMMITTEE has used publicly owned facilities located in the United States in connection with the Olympic Games in the past, in each of those years in which the Olympic Games have been sited and held in the United States.

Answer Admitted, insofar as it may be directed to do so. See response to Defendants' Interrogatory No. 24.

4. Plaintiff UNITED STATES OLYMPIC COMMITTEE has received one or more grants, pledges, gifts, bequests or donations of money, goods, services or a combination of those things from one or more public officials of the City of Los Angeles, in connection with the 1984 Olympic Games to be held in Los Angeles, California in 1984.

Answer Denied. The extent of payments of contributions from any governmental agency has been set forth in the answers to Defendants' Interrogatory No. 23. To the extent the request refers to any officials acting as private citizens, the request is objected to as irrelevant and not calculated to lead to the discovery of relevant evidence, as burdensome in that it would require examination of every single donation to the Olympic Committee and further objects on the same grounds as set out in response a Defendants' Interrogatory No. 6.

5. Plaintiff UNITED STATES OLYMPIC COMMITTEE has received one or more grants, pledgds, gifts, bequests or donations of money, goods, services or a combination of those things from one or more public officials of the States of California, in connection with the 1984 Olympic Games to be

held in Los Angeles, California in 1984.

Answer See response to request to admit No. 4.

6. Plaintiff UNITED STATES OLYMPIC COMMITTEE has received one or more grants, pledges, gifts, bequests or donations of money, goods, services or a combination of these things from one or more public officials of the United States of America or of the United States government, in connection with the 1984 Olympic Games to be held in Los Angeles, California in 1984.

Answer See response to request to admit No. 4.

7. There are at least 300 separate business establishments in the United States that are using the terms "Olympic", "Olympics", "Olympiad" or one or more of these terms in conjunction with the trade or sales of goods or services, or both such trade and sales, as of August 9, 1982.

Answer Plaintiff lacks sufficient information to either admit or deny, and, therefore, denies.

8. There are at least 25 theatrical exhibitions, athletic performances and athletic competitions that have been held in the United States at one or more times during the period from January 1, 1978 to August 9, 1982, and whose sponsors, oganizers or participants have used the terms "Olympic", "Olympics", "Olympiad" or one or more of these terms in writing to promote such exhibitions, performances and competitions.

Answer Admitted. Plaintiff lacks knowledge of the specific number, but believes that there have been more than 25 "Special Olympics" events alone, and more than 25 events in the 1980 Winter Olympic Games in Lake Placid, New York.

9. As of the date of service of this set of requests for admissions, the UNITED STATES OLYMPIC COMMITTEE exercises authortiy as to the persons who may appear and compete in behalf of the United States in the Olympic Games.

Answer Denied, insofar as the request implies that sole authority resides in the Plaintiff United States Olympic Committee. The Olympic Committee's members, the national governing bodies of each sport, actually conduct the Olympic trials in each sport.

10. One object and purpose of the UNITED STATES OLYMPIC COMMITTEE is to promote and support amateur athletic activities involving the United States and foreign nations.

Answer Admitted.

(Jurat omitted.)

Cause Submitted: March 15, 1983

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Memorandum Opinion

The unpublished opinion affirming the preliminary injunction is reprinted as Appendix 7, pages 81-90, of the Petition for Certiorari.

File Date: April 7, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Plaintiffs' First Supplement to Interrogatory Answers

Plaintiff United States Olympic Committee hereby supplements and amends its answer to defendant's Interrogatory No. 27:

Although plaintiff believed at the time of its response that it had paid no income taxes, subsequent investigation disclosed that, on advice of its accountants, a small portion of the Olympic Committee's revenues were treated as unrelated business income, and the following taxes were paid:

1979 — $1,573.18
1980 — $5,221.80
1981 — $3,550.00

UNITED STATES OLYMPIC COMMITTEE
By C. Robert Paul, Jr. (Signed)
Director of Public Information

(Jurat omitted.)

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Motion and Motion of Plaintiffs for Summary Judgment on the Complaint and Counterclaim

To defendants and their attorneys of record:

Please take notice that on Monday, October 17, 1983, at 10:00 A.M. or as soon thereafter as the matter may be heard, before the Honorable Robert F. Peckham, in Courtroom 12 of the above Court, plaintiffs *INTERNATIONAL OLYMPIC COMMITTEE* and *UNITED STATES OLYMPIC COMMITTEE* will move the Court for an order granting summary judgment in their favor on both the complaint and the counterclaim in this action. This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure and on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

This motion is based on this notice, the memorandum and declarations filed herewith, the proposed order, and all of the records and files in this action.

Dated: September 16, 1983

(Names omitted. See J.A. 5, above.)
By Vaughn R. Walker (Signed)
Attorneys for Plaintiffs
International Olympic Committee
and United States Olympic Committee

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing.)

Plaintiffs' Memorandum in Support of Motion for Summary Judgment

(Indexes omitted in printing.)

PRELIMINARY STATEMENT

Plaintiffs **INTERNATIONAL OLYMPIC COMMITTEE** ("IOC") and **UNITED STATES OLYMPIC COMMITTEE** ("USOC") seek an injunction against defendants under the Amateur Sports Act of 1978, 36 U.SC. § 380. Plaintiffs obtained a temporary restraining order in this matter on August 9, 1982, and this Court granted plaintiffs a preliminary injunction on August 24, 1982. The preliminary injunction was affirmed on appeal by the Ninth Circuit on April 8, 1983.

Discovery closed on September 1, 1983. The existing record establishes plaintiffs' right to summary judgment on its claim for a permanent injunction under the Amateur Sports Act. Because defendants' counterclaim is premised on a finding that the preliminary injunction was improperly issued, plaintiffs are entitled to summary judgment on the counterclaim as well.

I. FACTUAL BACKGROUND

Defendant Waddell began efforts in 1981 to organize a series of athletic games to be held in San Francisco in late August 1982. Waddell formed a corporation for this purpose that he wished to call "Golden Gate Olympic Association," but was informed by the California Department of Corporations that "Olympic" could not be used in a corporate title (Waddell Decl., filed Aug. 16, 1982, p. 4). The organization was incorporated under the name "San Francisco Arts & Athletics."

By late 1981, Waddell was aware that the use of "Olympics" to describe his athletic games may constitute trademark infringement, and he wrote to the USOC on December 26, 1981 requesting permission to use the term (Waddell Decl., Exh. A). Three days earlier, USOC executive director F. Don Miller, had sent Waddell a letter advising him of the Amateur Sports Act of 1978 and asking Waddell to discontinue use of "Olympic" (Miller Aff., filed August 9, 1982, Exh. A). The USOC reaffirmed this position after receiving Waddell's letter of December 26 (id., Exh. D).

This Court has already reviewed the various communications between the parties in early 1982 (Order on Prelim. Inj., filed August 20, 1982, pp. 3-5). The relevant point is that at no time did plaintiffs consent to defendants' use of the term "Olympic." In June 1982, the USOC became aware that defendants were referring to their games as the "Gay Olympics" (Kline Decl., filed August 9, 1982, p. 2). Subsequent investigation disclosed that the "Gay Olympics" were to be closely modeled on the Olympic Games in terms of style and format (ibid.). Accordingly, plaintiffs filed this action in this Court on August 9, 1982, to prevent defendants' unauthorized use of Olympic terminology and symbols.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM UNDER THE AMATEUR SPORTS ACT.

The Amateur Sports Act provides in relevant part:

"(a) Without the consent of the Corporation [USOC], any person who uses for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibit, athletic performance, or competition

* * * * *

"(4) the words 'Olympic', 'Olympiad', 'Citius Altiur

Fortius' or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946).

* * * * *

"(c) The Corporation shall have exclusive right to use the name 'United States Olympic Committee'; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights described in subsection (a) of this section."

In connection with plaintiffs' claim under this statute, the following facts are undisputed:

1. At no time did plaintiffs consent to defendants' use of Olympic terms or symbols (see Part I, supra).

2. Defendants promoted the "Gay Olympics" as a series of athletic events of an international scope modeled on the original Olympic Games (Waddell Decl., Exhs. J, Y). SFAA itself was organized for "the promotion of sports events within the framework of Olympic style competition" (id., Exh. J).

3. The "Gay Olympics" were to include the carrying of a torch, an opening parade, closing ceremonies and presentation of contestants behind banners and flags of their home cities or countries (id., Exhs. I, J, Y). In a letter to prospective supporters, Dr. Waddell claimed that the opening ceremony would "rival the traditional Olympic Games" (id., Exh. I).

4. The Games were to include at least 10 sporting events that take place in the Olympic Games (id., Exh. J; see Order on Prelim.Inj., p. 9 & nn. 3 and 4). Defendants planned to award gold, silver and bronze medals to the top three competitors in each event (id., Exh. I).

5. The acknowledged intent of defendants was to create

"an Olympic-style format" (id., p. 2), and to "emulate the true nature of an Olympiad" (id., p.9).

6. The Games were to be open to all competitors, regardless of sexual preference (id., p. 9), as are the Olympic Games (Miller Aff., p. 3).

7. The stated goal of the Gay Games — "participation, cooperation, and friendship" (Waddell Decl., Exh. J) — is consistent with the Olympic philosophy set forth in the Olympic Creed — "The most important thing in the Olympic Games is not to win but to take part" (see Order on Prelim. Inj., p. 10).

8. Defendants' long-range goal for the Games is to sever their identity with the gay community and have them open to and identifiable with the entire public generally (Preston Aff., filed August 9, 1982, Exh. A; see Gordon Decl., Exh. B, No. 3).

9. In connection with their promotion of the "Gay Olympics," defendants solicited contributions using the term "Olympic," sold goods including "an official Olympic T-shirt," buttons, bumper stickers and "Olympic" emblems, published an "Olympics" newsletter, and referred to their office as "Olympic Headquarters" (Waddell Decl., and supporting exhibits; Miller Aff., Exh. C*).

Based upon these facts, it is plain that plaintiffs are entitled to summary judgment on their claim under section 380. The factual similarities between the defendants' activities and the Olympic Games are such that defendants' use of Olympic terminology would tend "to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity" (36 U.S.C. § 380(a)(4)). Proof of actual confusion is unnecessary for this determination (*Golden Door, Inc.* v. *Odisho* (9 Cir. 1980) 646 F.2d 374, 351; *AMF, Inc.* v. *Sleekcraft Boats* (9 Cir. 1979) 599 F.2d

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* Defendants have admitted that the promotional materials attached to the Miller Affidavit as Exhibit C are their own (Gordon Decl., Exh. A, No. 1).

341, 353).

In its memorandum decision of April 8, 1983, the Ninth Circuit indicated, after extensive statutory and historical analysis, that the "tendency to cause confusion" requirement may apply only to combinations or simulations of Olympic terminology and symbols and not to the use of the term "Olympic" itself (Memoraundum, p. 3 & n. 1). Under the predecessor statute to the present Section 380, it was unlawful per se to use the word "Olympic" for any of the proscribed activities, including the inducement of attendance at any athletic performance or competition. As the legislative history plainly shows, these per se prohibitions were carried forward to the present statute:

> "Section 110 of S. 2727 [the present Section 380] would amend section 379 of title 36, United States Code, which provides penalties for unauthorized use of Olympic designations. Presently 36 U.S.C. 379 prohibits unauthorized use of * * * the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius'.
>
> * * * * *
>
> "The amendments made by section 110 of S. 2727, to which our comments are directed, would *add to the list* of designations whose unauthorized use is prohibited * * * (3) a combination, simulation, or confusingly similar derivation of the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius' which would tend to cause confusion, mistake or deception, or which would fasely suggest a connection with the Corporation or any Olympic activity.
>
> * * * * *
>
> "Section 110(a)(4) makes actionable *not only use of the words 'Olympic'*, 'Olympiad', 'Citius Altius Fortius', and any combination thereof, *but also any simulation or confusingly similar derivative thereof* tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic Activity.
>
> * * * * *

> "Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. words described in section (a)(4) tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any Olympic activity." (H.R.Rep. No. 1627, 95th Cong., 2d Sess. 36-38, reprinted in U.S.Code Cong.& Ad.News 7478, 7494-96) (emphasis added).

Since defendants admittedly used the word "Olympic" both for the purpose of trade and to promote athletic competition, the Court need go no further in order to grant plaintiffs summary judgment. However, even were a "tendency to confuse" the proper standard, such a tendency has been demonstrated by abundant evidence.

Prior rulings of this Court and the Ninth Circuit have laid to rest defendants' contention that they are not subject to section 380 because SFAA is a nonprofit corporation. Section 380 expressly provides protection against the use of "Olympics" to promote, without plaintiffs' consent, "*any* * * * athletic performance, or competition" (emphasis added). It is therefore applicable regardless whether such promotion constitutes a trade or whether it is done for, or results in, a profit. Defendants were, in any event, soliciting contributions and selling products such as T-shirts, buttons and posters under various "Olympic" designations. A nonprofit corporation, such as defendant San Francisco Arts & Athletics, Inc., may carry on business for profit (Cal.Corp.Code, § 5140(1)). Moreover, "[i]t is not necessary, in order to constitute trade or business, that it shall be carried on for profit" (*American Medical Ass'n* v. *United States* (D.C.Cir.1942) 130 F.2d 233, 237, affirmed (1943) 317 U.S. 519).

III. DEFENDANTS' CONSTITUTIONAL DEFENSES ARE WITHOUT MERIT.

Throughout these proceedings defendants have contended that issuance of an injunction would violate their First and Fourteenth Amendment rights because (1) prohibiting their use of Olympic terminology violates their free speech rights, and (2) this enforcement action discriminates against the gay community in violation of the equal protection clause. As previous rulings in this case have recognized, both of these defenses are without merit.

The First Amendment claim fails because the speech involved in this case is commercial in nature and may properly be enjoined (see *Lloyd Corp.* v. *Tanner* (1972) 407 U.S. 551, 567; *Dallas Cowboys, Etc.* v. *Pussycat Cinema, Ltd.* (2 Cir. 1979) 604 F.2d 200, 206). As the Ninth Circuit held in this case, "There is no first amendment right to use the word 'Olympic' in the title of [defendants'] games so long as there are other adequate means by which [defendants'] can communicate their message" (Mem., p. 3).

The Fourteenth Amendment "discriminatory enforcement" claim is similarly unavailing. Plaintiffs have established that their enforcement activities have not amounted to a violation of defendants' constitutional rights (Kline Supp.Decl. filed August 16, 1982; see Order on Prelim.Inj., pp. 14-15; see also Kline Decl., filed herewith).

An independent basis for rejecting these constitutional claims is that no state action is present (*DeFrantz* v. *United States Olympic Com.* (D.D.C. 1980) 492 F.Supp. 1181, 1193-1194). The fact that an injunction is sought from this Court does not transform the activity into state action (*Interbank Card Ass'n* v. *Simms* (M.D.N.C. 1977) 431 F.Supp. 131, 133).

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE COUNTERCLAIM

Inasmuch as defendants' counterclaim is premised entirely on a finding that the issuance of an injunction was and is improper, plaintiffs are entitled to summary judgment on the counterclaim as well.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment on the complaint and counterclaim should be granted. This Court should enter judgment ordering that defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or acting in concert with them, and each of them, shall permanently cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combination or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event pursuant to 36 U.S.C. § 380.

Dated: September 16, 1983.

Respectfully submitted,

(Names omitted. See J.A. 5, above.)

By: Vaughn R. Walker (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing.)

Declaration of Richard G. Kline in Support of Motion for Summary Judgment

RICHARD G. KLINE declares as follows:

1. In addition to serving as one of counsel for plaintiffs in this action, I am Counselor as well as trademark counsel for plaintiff United States Olympic Committee. If sworn as a witness, I could and would of my own personal knowledge competently testify under oath to the matters stated herein.

2. Since my "Supplemental Declaration in Support of Order to Show Cause Re Preliminary Injunction," filed in this matter on August 16, 1982, the United States Olympic Committee has taken substantial action, and has achieved substantial results, in its program to protect its rights to the word "Olympic" and other Olympic-related designations under the Amateur Sports Act of 1978.

3. Since August 1982, the Olympic Committee has made approximately 135 requests to a wide variety of individuals and organizations, seeking their voluntary cessation of unauthorized use of Olympic-related designations and their compliance with the Amateur Sports Act of which approximately 105 related to use of the word "Olympic". Among those written to was the Muscular Dystrophy Association (Exhibit N).

4. Since August 1982 the Olympic Committee has brought further civil actions to enforce its rights under the Amateur Sports Act. These actions include:

a. *United States Olympic Committee v. March of Dimes Birth Defects Foundation,* No. 83-539 (D. Col.). A copy of the judgment permanently enjoining the March of Dimes from unauthorized use of "Olympic" is attached as Exhibit O.

b. *United States Olympic Committee et al. v. Adelman Enterprises,* No. CV-83 2697RG (C.D. Cal.). A copy of the judgment permanently enjoining the defendant from further unauthorized use of Olympic-related designations is attached as Exhibit P.

c. *United States Olympic Committee v. International Federation of Body Builders, et al.,* No. 81-0969 (D.D.C). A copy of the order finding violations of the court's judgment is attached as Exhibit Q.

d. *United States Olympic Committee v. Millsport, Inc. et al.,* No. 82-3239 (D.D.C.). A copy of the judgments obtained in that case are attached as Exhibit R.

5. In addition to the above civil actions, the Olympic Committee has, since August 1982, initiated various proceedings in the United States Patent and Trademark Office to protect its rights under the Amateur Sports Act.

(Jurat and exhibits omitted in printing.)
(Exhibits are in Record, Docket #72.)

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing.)

Declaration of Robert A. Gordon in Support of Plaintiffs' Motion for Summary Judgment

ROBERT A. GORDON declares as follows:

1. I am associated with Pillsbury, Madison & Sutro, counsel for plaintiffs.

2. The documents attached hereto as the following exhibits are true and correct copies of the following materials generated through the discovery process in this case:

Exhibit A: Defendants' Responses to Plaintiffs First Set of Requests for Admissions, served August 31, 1983.

Exhibit B: Defendants' Answers to Plaintiffs' First Set of Interrogatories, served August 31, 1983.

Exhibit C: Letter from counsel for defendants, indicating verifications will be forthcoming, received August 31, 1983.

(Jurat omitted.)

(Exhibits A & B omitted in part in printing. Exhibits A & B are in Record, Docket #73.)

File Date: August 31, 1983

(Names & caption omitted in printing, see J.A. 62 above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Defendants' Responses to Plaintiffs' First Set of Requests for Admissions

(FRCP Rule 30 and Local Rule 230-3)

EXHIBIT A

To: Plaintiffs INTERNATIONAL OLYMPIC COMMITTEE and UNITED STATES OLYMPIC COMMITTEE and to their attorneys of record:

Defendants SAN FRANCISCO ARTS & ATHLETICS and DR. THOMAS WADDELL respond to your First Set of Requests For Admissions in the above-captioned action as follows:

Request for Admission No. 1: The documents attached hereto as Exhibit A are true and correct copies of defendants' "promotional materials" as that term is used on page 8, lines 25-26 of the Declaration of Thomas F. Waddell, filed August 26, 1982.

Response: Yes. These materials were used promotionally prior to issuance of the temporary retraining order in this action.

Request for Admission No. 2: The circled portion of the document attached hereto as Exhibit B is a true and correct statement made by defendant Thomas F. Waddell.

Response: Denied.

Request for Admission No. 3: The long-range goal of the defendants with respect to the Gay Games was or is as stated in the circled portion of the newspaper article attached hereto as Exhibit B.

Response: Denied. The long-range goal of the Gay Games is not a matter of policy in respect to its label. However, it is a long-range goal of the Gay Games to include athletic participation for all people regardless of athletic ability, gender, age, race or sexual orientation/preference.

Request for Admission No. 4: The circled portion of the document attached hereto as Exhibit C accurately sets forth an announcement made by defendants.

Response: Yes.

Dated: 31 August 1983

By: Mary C. Dunlap (Signed)
Attorney for Defendants

(Jurat omitted.)

File Date: August 31, 1983

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Defendants' Answers to Plaintiffs' First Set of Interrogatories

(FRCP Rule 33 and Local Rule 230-1)

EXHIBIT B

To: Plaintiffs INTERNATIONAL OLYMPIC COMMITTEE and UNITED STATES OLYMPIC COMMITTEE and to their attorneys of record:

Defendants SAN FRANCISCO ARTS & ATHLETICS and DR. THOMAS WADDELL respond to your First Set of Interrogatories in the above-captioned action as folows:

Interrogatory No. 1: If you have not admitted without qualification all of the matters stated in Request for Admission No. 1, please state all your reasons for your denial or qualification.

Answer: Not applicable.

Interrogatory No. 2: If you have not admitted without qualification all the matters stated in Request for Admission No. 2, please state the following:

(a.) All your reasons for your denial or qualification; and

(b.) Your best recollection of the statement made to the reporter on this matter.

Answer: (a.) I did not suggest to Mr. Art Rosenbaum that the name of the future Games should be the People's Olympics or that I was in any position to change it thusly.

(b.) In the phone conversation between myself and Mr.

Rosenbaum which resulted in the column reproduced as "Exhibit B", I suggested to Mr. Rosenbaum that these Games were not so much a "Gay" olympics as they were a "People's" olympics, implying that the issues addressed by these Games (ageism, racism, sexism, nationalism) applied to a broader representation than just a sexual orientation.

Interrogatory No. 3: If you have not admitted without qualification all of the matters stated in Request for Admission No. 3, please state the following:

(a.) All your reasons for your denial or qualificaiton; and

(b.) What the defendants' long-range goals are with respect to the participation and interest of the general population in the Gay Games.

Answer: (a.) Request for Admission No. 3 requests a response to the statement, "the long-range goal of the defendants with respect to the Gay Games was as stated in the circled portion of the newspaper article attached hereto as Exhibit B." If this statement refers to returning the word "gay" to its dictionary meaning, then this is clearly *not* a "goal" of the Gay Games; it is my personal attitude. If the statement refers to the change of the name to "People's Olympics", then this too is *not* a "goal" of the Gay Games. If the statement refers to the Gay Games' long-range goals of providing an athletic competition and a means of self-fulfillment for everyday people doing everyday things, then this is a long-range goal of the Gay Games.

(b.) The long-range goals of the defendants with respect to the participation and interest of the general population in the Gay Games have as their primary source the "Purpose and Scope" which constitute Article L of the By-laws for the California non-profit corporation known as San Francisco Arts & Athletics Inc., which states: "The specific and primary purpose is to deliver and administer cultural activities within the Bay Area. Particular emphasis shall be placed on public education serving the needs of racial, ethnic, cultural and sexual minorities."

The Gay Games in 1982 were one project of SFA&A towards its stated goals. Future plans for Gay Games will be the task of the Board of Directors of SFA&A.

Another source of the long-range goals of the defendants is the opinion of Thomas F. Waddell, M.D., named also as a defendant in this action. (See Declaration of Thomas F. Waddell filed in opposition to Plaintiff's Motion for Preliminary Injunction in this action.)

Interrogatory No. 4: With respect to the Gay Games, please set forth:

(a.) An itemization of all gross revenues received to date;

(b.) An itemization of all expenses to date;

and

(c.) All profits earned to date.

Answer: (a.)-(c.) Attached to these Answers to First Set of Interrogatories to Defendants are copies of relevant documents from which the answer to Interrogatory No. 4 may be derived.

Interrogatory No. 5: With respect to defendants counterclaims filed August 27, 1982, please set forth the amount of damages defendants have suffered as claimed in paragraph 3 of your prayer for judgment.

Answer: $43,118.00

Interrogatory No. 6: With respect to the figures set forth in response to Interrogatory No. 5, please set forth:

(a.) A breakdown or itemization of the figures together with the manner of calculating such figures; and

(b.) All facts in support of your allegation that defendants have been damaged in that amount.

Answer:

(a.) *Item of damage:*	*Amount:*
1. human resources diverted to legal defense and litigation	incalculable
2. time diverted to compliance with TRO/injunction	incalculable
3. potential ticket sales lost due to belief that Games had been cancelled	incalculable

4. anticipated revenues from sales of posters, products, etc.

		Retail values:
2500 Gay Olympic Games buttons (unit cost $.293		$ 2,500.00
200 original serigraphs donated to Gay Olympic Games by artist (unit cost: donated) (collectors item)		30,000.00
800 original singed silk screen friezes of Gay Olympic Games (unit cost: $450 (30% to artist))		8,400.00
250 T Shirts		
16 sweat bands		
6 tank tops	(unit cost:	
7 shirts	$750.00)	
9 sweats		2,218.00
	Total damages:	$43,118.00

(b.) Until the temporary restraining order was placed upon us in relation to the Gay Games there had been the successful sale of items of the types listed above and there was the anticipation of the revenues from the new collectors' series of posters. The potential revenues from the sale of these items were to serve as our resource for the activities of Gay Games week. Since these items had been popular and successful, we relied on their continued quick sale. Along with the sudden drop in ticket orders as a result of the TRO, the Games products also declined and we were left with the aforementioned products, posters and buttons which, containing the word "Olympic", became unmarketable.

Interrogatory No. 7: If you have not admitted without qualification all of the matters stated in Request for Admission No. 4, please state the following:

(a.) All your reasons for your denial or qualification; and

(b.) Your best recollection of the announcement to which the circled portion of the document attached hereto as Exhibit C refers.

Answer: Not applicable.

Dated: 31 August 1983

Thomas F. Waddell (Not Signed)
Defendant/Cross-plaintiff.

VERIFICATION

I, THOMAS F. WADDELL, do hereby declare under penalty of perjury: I am a defendant and cross-plaintiff in the above-entitled action. I have read the foregoing answers to Plaintiff's First Set of Interrogatories To Defendants, and know the contents thereof. The same are true and correct of my own personal knowledge.

(not executed or signed)

EXHIBIT C

MARY C. DUNLAP

Attorney at Law
(415) 587-8320

425 Staples Avenue
San Francisco, Ca 94112

August 31, 1983

To: All Counsel in *International Olympic Committee et al. v. San Francisco Arts & Athletics Inc. et al.* C-82-4183 RFP

From: Mary C. Dunlap, Counsel (initial omitted)
for Defendants/Cross-plaintiffs

On this date you were served with unverified, unsigned copies of the answers to interrogatories and responses to requests for admissions that were served upon defense counsel by mail on July 29, 1983. Due to unavoidable time problems, the answers and responses will be verified and signed, and copies of the verifications and signatures will be sent to you, as soon as possible. Thanks for understanding.

File Date: October 3, 1983

(Names & caption omitted in printing, See J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment

(Indexes omitted in printing.)

I. INTRODUCTION

Defendants and cross-plaintiffs San Francisco Arts & Athletics Inc. ("SFAA") and Dr. Thomas Waddell ("Dr. Waddell") oppose the motion of International Olympic Committee ("IOC") and United States Olympic Committee ("USOC") for summary judgment on the grounds that (1.) there *are* triable disputes of material fact in this action and (2.) IOC and USOC are *not* entitled to judgment in their favor as a matter of law. Defendants SFAA and Dr. Waddell contend that the moving papers by IOC and USOC misstate record materials in a manner that disguises triable disputes of material fact, and that the moving papers mischaracterize principles and authorities as to relevant constitutional and trademark law.

II. CERTAIN MATERIAL FACTS *ARE* DISPUTED AS TO PLANTIFFS' CAUSE OF ACTION BASED UPON THE AMATEUR SPORTS ACT OF 1978.

In dictum in its opinion upholding this Court's preliminary injunction at bar, the U.S. Court of Appeals for the Ninth

Circuit suggested that, where a party uses the word "Olympic" for trade, in sales or certain promotions, 36 U.S. Code 380(a), USOC might not be legally obligated to prove that the use of "Olympic" is one "tending to cause confusion...". (Memo. opinion p.3 & n.1 (4/8/83)). That dictum contains no reasoning or authority as to the implications of such a reading of 36 U.S. Code 380(a) for first amendment purposes. Defendants contend that for this Court to adopt the above-cited reading of section 380(a) of the Amateur Sports Act would depart significantly from the declared purposes of Congress in making that enactment, and would heedlessly and unnecessarily create a conflict between the statute and the constitutional guarantee that "Congress shall make *no* law...*abridging the freedom of speech...*". U.S. Const. Amend. I (emphases added).

In enacting 36 U.S. Code section 380, Congress did not prohibit *all* uses of "Olympic" for which the user does not have the consent of USOC. *S.T.O.P. v. USOC*, 489 F.Supp. 1112, 1119-1120 (S.D.N.Y. 1980). In granting the preliminary injunction in the case at bar, this Court agreed with the District Court in the *S.T.O.P.* case that "section 380 does not establish a *per se* rule against the unauthorized use of the word 'Olympic'...". (Order p. 8 (8/20/83)).

If this Court were to interpret section 380 to permit USOC to prohibit *any* use of "Olympic" in conjunction with trade, sale or certain promotions, section 380(a), that interpretation would imbue Congress with the intent to empower USOC to become the arbiter of all uses of "Olympic" that are associated with any publication, advertising, notice, announcement or other medium that involves any commercial element. Such interpretation places section 380 on a collision course with decisions of the U.S. Supreme Court that hold that a subsidiary commerical element in a communication cannot render it unprotected speech. *See, e.g., New York Times v. Sullivan*, 376 U.S. 255, 265-266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964)(Paid advertisement soliciting contributions for Dr. Martin Luther King, which was basis for $500,000 libel award, was held to be speech protected by first amendment; "defamation" claims by public officials were observed to be a potential backdoor restraint upon free speech); *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)(Court invalidated license tax on Jehovah's Witnesses' literature because sales of that literature were "merely incidental and collateral" to the group's principal aim of dissemination of religious beliefs). Defendants contend that such a reading of section 380 literally and unconstitutionally would empower Congress to give away words, and to bestow upon other entiities the power to punish uses of those words that the entities (or Congress) do not authorize. It is difficult to imagine a more frontal assault upon the first amendment prohibition of Congressional abridgement of free speech.

Until the enactment of 36 U.S. Code section 380, "Olympic" was a word that USOC could not lawfully trademark, nor enforce the claimed trademark upon, because "Olympic" was (and is) a generic, ancient word, in widespread use by persons and entities unrelated with USOC; USOC's inability to resist certain trademark applications was an origin of the bill's intent. *U.S. Code Cong. & Admin. News* 7494-7497 (1978); *see Anti-Monopoly Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1321- 1327 (9th Cir. 1982) cert. denied, U.S. (1982). In enacting section 380, Congress bestowed a most unusual and otherwise unattainable trademark upon USOC as to this word. *Id.* To interpret section 380 to reach further, bestowing more than a protectible trademark upon USOC by disregarding the tests of confusion etc. built into section 380 in express terms and by reference to the Trademark Act, simply would invite an unnecessary conflict with the first amendment.

Moreover, in the case at bar there is no question that the part of section 380 that refers to "...any combination or simulation thereof tending to cause confusion..." is the part of the statute upon which USOC's and IOC's claim depends. There is not a stitch of factual support for the proposition that defendants have used or proposed to use "Olympic" *by itself* in trade, for sale or for certain promotions identified in section 380. All record evidence establishes without ambiguity that defendants used and proposed to use the terms "Olympic" and "Olympics" *in combination with* the term "Gay". "Gay" was used to refer to a certain group of persons definable, or self-defined, by reference to sexual orientation/affectional preference. *Cf. Cyr v. Walls*, 439 F.Supp. 697, 699 n.2 (N.D. Tex. 1977) (Ex. G to Dec. T. Waddell Opp. Mo. Preliminary Injunction (below, Dec. Waddell)). Accordingly, unless the part of section 380 that refers to "...any combination or simulation thereof tending to cause confusion...[etc.]" is to be rendered meaningless,[1] and unless this Court is to ignore the record evidence that plainly establishes that defendants used "Olympic" and "Olympics" in combination with other words, to describe and identify the first international Gay "Olympic" Games, the dictum in the Court of Appeals' opinion upholding this Court's preliminary injunction, concerning proof of tendency to confuse, cannot be validly and correctly read to preclude proof of that tendency in the case at bar.

The remainder of the arguments in this part of this memorandum rely upon the assumption that this Court will require plaintiffs to prove tendency to confuse as required by section 380 when "Olympic" is used in combination with terms that are not part of USOC's trademarks. Defendants also note that the instant motion relies expressly upon the "tending to cause confusion" clause of section 380, and not upon any other clause of that section (eg. mistake, deception, false suggestion).

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[1] Counsel for defendants does not use the term "meaningless" lightly in this context. If the Court of Appeals' view, that tendency to confuse need not be proved in order for USOC to secure the remedies provided by the Trademark Act in *any* case of use of "Olympic" in trade, etc., were accepted by this Court, then that language would be effectively excised from section 380.

A. Tendency to confuse must be proved, and it is disputed as a matter of fact.

As contended above, USOC must prove that defendants' use of "Olympic" was or would have been one "tending to cause confusion" as set forth in section 380. See argument above pp.2-5. The question of tendency to confuse is factual, and there is a dispute as to it of record in the case at bar. (Compare Dec. Waddell p.3 lines 22-24; p.8 lines 6-24; p.11 lines 10-24; Ex's. H, J p.2 (re purposes of Games); Ex DD to Dec.M.Evans Opp. Mo. Prelim. Inj. (re purpose of SFAA); Dec.P.Mart Opp. Mo. Prelim. Ing. p.2 lines 8-11; Dec. E.Petersen p.2 lines 6-12, with plaintiffs' assertion that they have proved a "tendency to confuse" beyond factual dispute, at Pltf.Memo.Supp.Mo.S.J. p.8 lines 2-4). It is obvious that there is a central material fact at issue in this case, and that it is disputed, to wit., whether SFAA's and Dr. Waddell's use of "Olympic" was or would be one "tending to cause confusion" as required to be shown by section 380. This triable dispute of material fact precludes issuance of summary judgment in favor of plaintiffs in this action. Rule 56(c) of the *Federal Rules of Civil Procedure* thus requires trial upon plaintiff's Amateur Sports Act cause in the case at bar.

B. Defendants' intent as to use of "Olympic" and as to the relationship between the Gay Games and the USOC/Olympics raises a triable dispute of material fact in this action.

As part of its findings in support of its issuance of a preliminary injunction in this action, this Court declared that "...the long range goal of the sponsors of [the Gay Games of 1982] is apparently to sever the Games from their direct connection with the gay community altogether". (Order p.9) Defendants vigorously and emphatically dispute that inference by this Court as to the intent of Dr. Waddell or others associated with SFAA. Indeed, in response to a request by USOC and IOC for an admission by Dr. Waddell as to the correctness of the newspaper article's attribution of language to Dr. Waddell upon which this Court's inference relied (Order p. 9 lines 21-29), Dr. Waddell denies that the attributed statement was true or correct, and he expressly *denied* that "[t]he long range goal of the defendants with respect to the Gay Games was or is as stated in the [newspaper article cited]". Responses of T. Waddell to Requests for Admissions, at Ex. A pp.1-2 to Dec.R.Gordon Supp.Mo.S.J.).

Yet in their memorandum in support of motion for summary judgment, IOC and USOC dare to assert that it is an "undisputed" fact that "Defendants' long-range goal for the Games is to sever their identity with the gay community and have them open to and identifiable with the entire public generally...", citing "Gordon Decl., Exh. B, No. 3." (Memo. Supp.Mo.S.J. p.5 lines 7-11). The cited portion of the exhibit to the Gordon declaration states:

> "*Request for Admission No. 3*: The long-range goal of the defendants with respect to the Gay Games was or is as stated in the circled portion of the newspaper article attached hereto...
>
> *Response: DENIED*. The long-range goal of the Gay Games is not a matter of policy in respect to its label. However, it is a long-range goal of the Gay Games to include athletic participation for all people regardless of athletic ability, gender, age, race or sexual orientation/ preference." (emphasis added)

Genuine issues of material fact, such as Dr. Waddell's intent, do not disappear in the context of a motion for summary judgment by means of misstatements as to parties' answers to requests for admissions, such as the gross misstatement contained in the list of purportedly "undisputed" facts offered by plaintiffs to this Court, cited above. Counsel for defendants also notes that other allegedly "undisputed" facts offered by plaintiffs simply read statements and materials in distorted ways, out of context and without the accompanying details that contradict the inferences that plaintiffs urge. (See Memo.Supp.Mo.S.J. numbers 2, 3, 7 & 9, pp.4-5). For purposes of this aspect of plaintiffs' motion, it is sufficient for defendants to point out that their declarations in opposition to the motion for preliminary injunction filed in 1982 raise triable disputes of material fact as to the intent of Dr. Waddell and other sponsors and founders of the Gay Games, as to the distinctions between the Games' purpose, philosophy and format and those of the Olympics, and as to the reasons for the use of "Olympic" by those who were participants in the planning and promotion of the Gay Games in 1982. (See declarations cited *supra* p. 6 lines 7-11) To infer that the goal of non-discriminatory participation is equivalent or connected to a severing of the Gay Games from the gay community, as plaintiffs apparently would cause this Court to do over the protestations of defendant Dr. Waddell as to what his *own* intent was and is, also is quite illogical and unfair. The gay community is diverse, and to include persons in an activity associated with it regardless of sex, age, race, physical ability or sexual orientation is certainly *not* tantamount to severing the gay community connection; instead, it is expanding the definition of the relevant group, *inter alia*, to assure inclusion of heterosexual supporters and proponents of the rights of lesbians and gay men along with those persons. The inference that plaintiffs have urged and that this Court originally and mistakenly accepted as to Dr. Waddell's intent, in conjunction with its reasoning as to evidence of "tendency to confuse", is an inference that has the potential of dividing and destroying any civil rights movement's momentum, by the simple *reductio ad absurdum* that as soon as the persons who are discriminated against reach outside their own ranks for support, they are "severing their ties" with the relevant community. The policy implications of this line of reasoning must be considered by this Court in this action, if it is to do justice in the interpretation of the Amateur Sports Act and of relevant federal constitutional guarantees in this case. In any event, the matter of Dr. Waddell's relevant intent in the use of "Olympic" in conjunction with the Gay Games and in the purposes and philosophy of the Games obviously raises triable disputes of material fact, insofar as plaintiffs' burden is to prove that the use of "Olympic" was one tending to cause confusion, as section 380 prescribes.

III. IOC AND USOC ARE *NOT* ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THEIR AMATEUR SPORTS ACT CAUSE OF ACTION.

A. Defendants' use of "Olympic" is permitted by the exception for "fair use in description" contained in the Trademark Act, 15 U.S.Code section 1115(b)(4).

Defendants SFAA and Dr. Waddell claim that even if USOC and IOC were able to meet their statutory burden with the requisite proof of tendency to cause confusion in the case at bar, defendants are statutority entitled to use "Olympic" as they did prior to the issuance of the injunction, based upon defendants' right, assuming *arguendo* that USOC's trademark is incontestable, to use the ancient, descriptive and generic word "Olympic" in good faith to describe the "goods or services" of SFAA, to wit., the Gay Olympic Games. Even the holder of an incontestable trademark cannot lawfully enjoin another party from using the trademarked term "*fairly and in good faith only to describe* to users the goods or services of such party..." 15 U.S.Code sec. 1115(b)(4) (emphasis added): *see, e.g., Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178 (5th Cir. 1980), cert.den. 101 S.Ct. 1516 (1981); *Polo Fashions Inc. v. Extra Special Products Inc.*, 451 F.Supp. 555 (D.N.Y. 1978)(defendant's commercial use of word "polo", descriptively, could not be enjoined, although use in conjunction with plaintiff's distinct typestyle and label colors was an infringement that could be enjoined); *Gracious Lady Service Inc. v. Welcome Wagon International Inc.*, 295 F.Supp. 1373 (W.D.Pa. 1969)(defendants' use of phrase "gracious ladies" in advertisments as to its similar service could not be enjoined); *Abercrombie & Fitch Co. V. Hunting World Inc.*, 537 F.2d 4 (2nd Cir. 1976)(where term is not used *as a trademark*, but for description, there is no infringement even as to an otherwise incontestable trademark). At a minimum the application of this statutory defense raises several triable disputes of material fact in this case. The issues of the nature of the use of "Olympic", its descriptive and identifying purpose, the good faith with which it was used and to be used and related issues arising out of the application of 15 U.S.Code sec 1115(b)(4) to the case at bar cannot be disposed of without trial herein.

Nor can there be any serious doubt that the defenses of the Trademark Act of 1946 apply in this litigation. If this Court were to hold that the defenses of that Act do not apply, it would be giving USOC something *better* than an incontestable trademark as to the word "Olympic"—it would be awarding USOC a license to govern the use of the word itself, even as against those who might use "Olympic" in good faith fairly to describe goods or services in no conceivable way related to the functions or interests of USOC. Defendants contend that to exclude the Trademark Act defenses from application in the instant case would contradict the intent of Congress in enactment of section 380. *See U.S.Code Cong. & Admin.News* 7494-7497, cited supra p.4; *S.T.O.P. v. USOC*, 489 F.Supp. at 1119-1120. It would also attribute an intent to Congress to empower an entity (here, USOC) to abridge free speech, in that it would award a license to USOC to prohibit *any* use of "Olympic" in conjunction with trade, sale or certain promotions, no matter how subsidiary and irrelevant the commercial element of the party's use of "Olympic" might be, and it would thus create unnecessary and severe constitutional problems with section 380, discussed briefly at pp. 2-4 above.

By ignoring the defense asserted by SFAA and Dr. Waddell in opposition to the plaintiffs' motion for injunctive relief in 1982, under section 1115(b)(4) of the Trademark Act, this Court then placed defendants in a *worse* position than that which would have been held by a commercial competitor using a term claimed to be subject to an incontestable trademark under the Lanham Act. There was and is *no* *reason* for such mistreatment of defendants by this Court. The intent of SFAA and Dr. Waddell in using "Olympic", and their allegations that they used this word in good faith fairly to describe the upcoming events and activities of the Gay Games of 1982 to prospective participants and supporters, cannot be swept aside in favor of summary judgment to plaintiffs under their section 380 claim, unless this Court is willing to place a nonprofit corporation using a word that legally cannot be trademarked (absent Congressional aid) for philosophical and descriptive purposes in a worse position, in terms of the balances and principles of trademark law, than a commercial competitor using an incontestable trademark term would hold. *Cf. AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)(Court of Appeals stressed the importance of weighing evidence of intent and purpose in determining whether trademark has been infringed and what the remedy should be as an equitable matter).

B. The duty of this Court to reconcile the Amateur Sports Act with constitutional guarantees cannot be fulfilled if plaintiffs' speech-infringing interpretation of their rights under that Act is accepted by this Court.

SFAA and Dr. Waddell sincerely and emphatically contend that the use of "Olympic" to identify, describe and promote the international Gay Games of 1982, with its express philosophy of overcoming homophobia and challenging discrimination against gay men and lesbians, by means of an all-encompassing participation of supportive people of every sexual orientation, race, sex, age and condition in a healthful, colorful athletic competition, constituted a clear exercise of freedom of speech that should have been held constitutionally protected. The interpretation of section 380 of the Amateur Sports Act that IOC and USOC so far successfully have urged upon this Court does not meet this free speech claim head-on, nor even propose a reconciliation with it; rather, the interpretation urged by plaintiffs flatly discards the free speech interests that are and have been advanced by defendants at bar.

Counsel for SFAA and Dr. Waddell respectfully submits that, in noting the differences between the instant case and *S.T.O.P.* (cited pp.2-3 *supra*) this Court so far has overlooked or neglected powerful and constitutionally significant similarities between the instant case and *S.T.O.P.* In both cases a non profit publicly interested group that was openly critical of USOC and the Olympics used the world "Olympic" for symbolic political and philosophical purposes in the course of its lawful activities. The word had and was intended by its users to have an altogether distinct meaning, reference and context from the Olympics for which USOC raises funds, governs amateur athletic opportunity and engages in other activities. Neither group operated in a manner that was designed or even likely to suggest any connection with USOC or the Olympic Games. In regard to this factual similarity, counsel respectfully reminds this Court that in February 1982, counsel for defendants offered to USOC to place an *express* disclaimer on *all* Gay Olympic Games materials and properties, with an asterisk by "Olympic" and a label reading "not associated with the U.S. Olympic Committee"; USOC rejected this proposal. (Dec.R.Kline Supp.Mo.Prelim.Inj. Ex.'s C & D). Yet, unlike the nonprofit group in *S.T.O.P.*, defendants here have suffered an injunction effectively prohibiting them from using the word "Olympic".

The interest of SFAA and Dr. Waddell and others enjoined in using the word "Olympic" as a part of their freedom of expression is no less worthy of legal protection than was that interest which the District Court found a statutory means of protecting in the *S.T.O.P.* decision. This interest in freedom of expression cannot be cast aside, consistent with the guarantee of the first amendment. This Court is respectfully urged in behalf of the defendants to review its reading of the Amateur Sports Act in light of the constitutional precedents governing speech, where one party claims that the speech involved is unprotected because it is commercial while the other party establishes that the commercial element is subsidiary to protectible political, philosophical or other express, or even that the otherwise "commercial" nature of the speech does not preclude its passing of information and ideas to those receiving the communication. In these cases, the Supreme Court firmly and often has protected speech against prohibition via the claim that it is "commercial" (except in cases of obscenity and false advertising, not at issue herein). *See, e.g., New York Times v. Sullivan* and *Murdock v. Pennsylvania*, cited p. 3 *supra*; *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976)(Court invalidated state statute prohibiting pharmacists from advertising prices of prescription drugs); *Linmark Associates v. Township of Willingboro*, 431 U.S. 748 (1977)(Court struck down local ordinance prohibiting posting of "For Sale" and "Sold" signs). Plaintiffs' unanalytical and categorical response to this strong line of authority, by which plaintiffs simply assert that "[t]he First Amendment claims fail because the speech involved in this case is commercial in nature and may be properly enjoined (citations omitted)" (Memo.Supp.Mo.S.J. p.9) does not take into account nor correctly read these Supreme Court decisions *protecting* even unambiguously commercial speech in cases where it provides information and/or ideas alongside serving its pecuniary purpose. Thus, even assuming *arguendo* that the facts at bar were to show that a primary purpose of defendants in using "Olympic" to identify and promote the Gay Games was "commercial", thus removing the case from the rule in *New York Times* and *Murdock*, *supra*, no authority or reason has been proposed to establish why these defendants—unlike the commercial entities in *Virginia Board* and *Linmark Associates*—are nonetheless not entitled to the same protection of their purportedly "commercial speech". In lofting the plaintiffs' view of the Amateur Sports Act higher than the first amendment's guarantee of free speech, even in commercial contexts, this Court would be placing an Act of Congress above the first amendment, which is precisely what the first amendment prohibits, in its terms. *See also*, discussion of protection of "commercial speech" in L. Tribe, *American Constitutional Law* 651-656 (The presence of hard cases in this area is "an insufficent reason either to return to the unprincipled extreme of excluding all commercial speech from first amendment protection (footnote omitted), or to embrace the equally indefensible position that government cannot prevent [7-Up sold as if it were insulin]...".

IV. DEFENDANTS' COUNTERCLAIMS RAISE TRIABLE DISPUTES OF MATERIAL FACT WHICH, IF RESOLVED IN DEFENDANTS' FAVOR, WILL ENTITLE DEFENDANTS TO JUDGMENT AGAINST PLAINTIFFS.

A. The issue of state action is a mixed question of fact and law, which cannot be resolved in favor of plaintiffs at this state, and which must be tried.

> "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."
>
> —*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

Defendants contend that USOC is engaged in state action; plaintiff USOC disputes this. State action is the prerequisite to the imposition of constitutional responsibilities upon USOC, and the determination of whether that prerequisite is fulfilled must depend upon the trial of facts as to the functions, purposes and relationship to government of USOC. Defendants contend that Congress' chartering and special empowerment of the U.S. Olympic Corporation, as well as the provision of funds to USOC including ten million dollars ($10,000,000.) for compensation of claimants of injuries arising from not sending a team to Moscow in 1980 and six and three-tenths million dollars ($6,300,000.) for minting of Olympic coins (see Pltf.Ans.Def.1st Set Interrogs. #23, pp.15- 16), and USOC's staging of and participation in the 1984 Olympics render USOC a government actor, using public resources and special powers bestowed by the federal government to perform a public function. The opinion in *DeFrantz v. USOC*, 492 F.Supp. 1181 (S.D.N.Y. 1980), in which the District Court held only that USOC had not been engaged in governmental action in deciding to boycott the Moscow Olympics, did not decide or reach the question whether USOC is doing state action in its determinations as to who may or may not use the word "Olympic". It is also important that the District Court in *DeFrantz* specifically criticized plaintiff's reliance there on state action precedents from the area of "discrimination" law; the instant case is in the center of that body of law. (See sections IV. B. and C. *infra*) Even assuming *arguendo* that USOC is a private entity performing a public function, and not a literal arm of the US government (a factual issue, awaiting trial to be properly resolved), USOC may be responsible for constitutional violations committed in the course of its performance of that public function. *See, e.g., Evans v. Newton*, 382 U.S. 296, 299 (1966)(provision of park held to be public function for constitutional purposes); *Marsh v. Alabama*, 326 U.S. 501 (1946)(company town's trespass law could not be used to prosecute Jehovah's witness distributing literature there). Where an entity is charged by Congress with the performance of particular functions, and is given special resources in order to perform them, from government, the entity should be held responsible to respect the constitutional rights of those it affects by its behavior. *See* cases cited *supra*; *see also Burton v. Wilminton Parking Authority* cited p. 16 *supra*; *Cf. Fortin v. Darlington Little League* 514 F.2d 344, 347-348 (1st Cir. 1975)(Local Little League was held to be doing state action for purposes of application of equal protection guarantee to require it to admit females to the teams; Little League's Congressionally chartered nature noted).

B. The defendants' counterclaim for violation of their first amendment rights raises triable disputes of material fact.

Defendants' First Cause of Action of their counterclaims against USOC and IOC alleges that USOC brought suit against SFAA and Dr. Waddell because of an intent and desire on plaintiffs' part to suppress and limit defendant's freedoms of expression and association, by means of removing the word "Olympic" from all references to the Gay Games of 1982 and any other activities by SFAA. (Answer & counterclaims, para's 5, 9, 10, 17 & 18, pp.10-12 (8/27/82); Dec.Waddell Opp.Mo.Prelim.Inj. p. 5 lines 15-22; pp. 10-11) Defendants contend that USOC and IOC have made a content based adverse judgement as to the conjunction between the word "Olympic" and defendants and their cause, and that they have enforced that adverse content-based judgement via this litigation, by means that accomplished a prior restraint and censorship, and that seriously damaged defendants. Further factual support for defendants' claim of violation of their first amendment rights, beyond Dr. Waddell's declaration cited above, can be found in USOC and IOC documents produced via discovery and presented with this opposition memorandum. (See Dec.M.Dunlap Opp.Mo.S.J. at Exhibits A-C thereof) Thus, the First Cause of Action of defendants' counterclaims cannot properly be disposed of by means of a motion for summary judgment, because its material allegations as to the infringements upon defendants' freedoms of speech and association are disputed, and must be tried.

Defendants also contend that if USOC is found to be engaged in state action relevant to this litigation, its *denial* of consent to defendants to use "Olympic", when requested in December 1981, constitutes a distinct and actionable infringement and abridgement of defendants' freedoms of expression and association. A governmental actor is constitutionally prohibited under the first amendment from denying a resource or facility to a gay/lesbian group that it has afforded to other non-gay groups, even if the resource or facility need not have been provided to anyone in the first place (and is a "limited public forum"). *Student Coalition for Gay Rights v. Austin Peay State University*, 477 F.Supp.

1267 (M.D.Tenn. 1979)(gay/lesbian group of students denied recognition were entitled to it from university officials); *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951(Alaska 1978)(city directory's omission of gay/lesbian group from listings denied free expression and was disallowed); *Gay Lib v. University of Missouri*, 416 F.Supp. 1350 (W.D.Mo. 1976), reversed, 558 F.2d 848 (8th Cir. 1977), cert. denied *sub nom Ratchford v. Gay Lib*, 434 U.S. 1080 (1978)(university's denial of recognition to student group violated first amendment rights of group and members); *Toward A Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976)(Use of state building as forum to present diverse historical and cultural offerings precluded group from excluding gay/lesbian offering in convocation, as a first amendment matter); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976)(denial of recognition of student group by Virginia Commonwealth University held to violate freedom of association of gay/lesbian group); *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974)(GSO was denied facilities to hold dance and conference, although it had been recognized as a student organization by university officials; court held that this treatment by officials deprived gay/lesbian group of its rights of free speech, association and assembly); *Wood v. Davison*, 351 F.Supp. 543 (N.D.Ga. 1972)(denial of permission for gay conference and dance held to violate freedom of expression of those involved in the activities); *cf. Fricke v. Lynch*, 491 F.Supp. 381 (D.R.I. 1980)(the right of a high school student to attend senior prom with his male companion was upheld as free expression). As in the above cited cases, the rights of free expression and association that are infringed by the denial of consent by USOC to defendants to use "Olympic" are precious rights, that must not be trivialized by reference to a cynical or biased view of the importance of the first international Gay Olympic Games; such trivialization constitutes censorship by its effect.

Plainly, defendants' First Cause of Action cannot be disposed of at this stage pursuant to plaintiff's motion. Issues of state action, intent, effect of the denial of consent and effect of the issuance of a preliminary injunction as to use of word "Olympic" raise triable disputes of material fact at this stage.

C. The defendants' counterclaim for unconstitutional discrimination raises triable disputes of material fact.

Defendants' Second Cause of Action of their counterclaims against USOC and IOC alleges that plaintiffs intentionally and purposefully have acted to discriminate against defendants and other lesbians and gay men by (1.) denying consent to SFAA and Dr. Waddell to use the word "Olympic" as requested, and (2.) litigating this action and seeking injunctive relief against the first international "Gay Olympic Games" and other activities of SFAA. (Answer & counterclaims para's 5, 9, 10, 19&20, pp.10-13; Dec.Waddell Opp.Mo.Prelim.Inj. p. 2 ll.20-28, p.4 ll.3-19, p.7 ll.7-15, p.10 ll.5-28, p.11 ll.1-24). Defendants contend that USOC's denial of consent to them to use "Olympic" and USOC's and IOC's bringing of suit and seeking of injunctive relief against such use were and are motivated by homophobic reactions to defendants, to gay men and lesbians generally and to the prospect of any use of "Olympic" by such people. Further factual support for this claim of discrimination of defendants, beyond Dr. Waddel's declaration as cited above, can be found in USOC's and IOC's documents produced via discovery and presented with these opposition papers. ("See Dec.M.Dunlap Opp.Mo.S.J. at Ex's A-C thereof). The Second Cause of Action of defendants' counterclaims thus cannot properly be disposed of by motion for summary judgment, because its material allegations as to discriminatory treatment of the Gay Games and their sponsors vis a vis other "Olympics" (eg. the Special, Junior, Police, Armenian and other "Olympics" expressly or tacitly permitted by USOC), and as to the invidious motive of USOC in denial of consent to defendants and the discriminatory intent of

USOC and IOC in bringing suit and seeking injunctive relief against defendants' use of "Olympic" are disputed, and must be tried.

The legal authorities upon which defendants' equal protection claim are based have been cited for the most part in Part IV. B. of this memorandum *supra* pp. 19-20 (express equal protection models were applied in *Gay Alliance v. Matthews*, 544 F.2d at 167, citing *Police Department of City of Chicago v. Moseley*, 408 U.S. 92 (1972)(different treatment of speakers by City police triggered application of equal protection as well as first amendment); *GSO v. Bonner*, 509 F.2d at 655 (injunction prohibited defendants from restricting GSO's use of university facilities and from treating GSO 'differently than other other University student organizations'); *Fricke v. Lynch*, 491 F.Supp. at 388 (court holds that a higher level of scrutiny than merely whether the government has a 'rational basis' is required, because Mr. Fricke alleges and has shown intrusion upon his fundamental first amendment right of free expresion).

The authorities cited by defendants firmly establish that freedom of gay men and lesbians and of non-profit public interest groups representing and serving these persons from discrimination by governmental actors, at least where such discrimination burdens exercise of a fundamental right, must be protected, unless both a compelling governmental interest served by the restriction upon speech and association and the absence of a non-discriminatory alternative are shown by the governmental actor. (USOC has offered neither at bar, preferring to rest on the assertion that it and IOC owe no constitutional duties to defendants at bar.)

V. THE PERMANENT INJUNCTION FOR WHICH IOC AND USOC HAVE PRAYED IN THIS CASE WOULD BE IMPROPER, BOTH CONSTITUTIONALLY AND EQUITABLY SPEAKING, EVEN IF THEY WERE ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR IN THIS ACTION.

The remainder of this memorandum assumes *arguendo* that this Court determines to grant summary judgment to plaintiffs, in spite of the absence of fulfillment by their case of the two prerequisites for such a judgment set forth in Rule 56(c).

A. An order permanently prohibiting defendants from any use of "Olympic" for trade, sale or certain promotions unnecessarily would infringe upon their first amendment rights.

The necessity of considering free speech implications in trade and commercial regulation cases, including trademark infringement cases, repeatedly has been recognized by the federal courts. *See, e.g., Better Business Bureau v. Medical Directors Inc.*, 681 F.2d 397, 405 (5th Cir. 1982); *In the Matter of R M. J,* U.S. , 102 S.Ct. 929 (1982); *Fur Information Case*, 364 F.Supp. 16,22 (S.D.N.Y. 1973), aff'd. on other grounds, 501 F.2d 1048 (2nd Cir. 1974), cert. denied, 419 U.S. 1022 (1974), cited with approval in *S.T.O.P., supra*, 489 F.Supp. at 1125. As those cases amply demonstrate, the fact that neither party to a trade regulation suit is found to be engaged in governmental action or under color of law does not minimize the first amendment considerations involved in the issuance of injunctive relief that restrains speech, even in those unambiguously commercial contexts.

For example, in *Better Business Bureau, supra*, the District Court found that the defendant weight-reducing clinics had used the trade name of the Better Business Bureau, in ads *falsely* representing that a satisfied customer of one of the clinics had been a Better Business Bureau "investigator", in a manner that the Court found to violate the Lanham Act. The Court of Appeals affirmed the findings and the result, but, relying significantly upon *In the Matter of R M. J, supra*, the Court of Appeals modified the injunction against references to the Better Business Bureau from prohibition to permitted use, requiring a disclaimer of association, and said modification of the injunction was expressly made on first amendment grounds. Surely in the case at bar, where the context of regulation of speech is far from purely commercial, and where the interest of defendants in freedom to use the ancient, generic term upon which USOC claims a trademark is at least as strong as the weight-reducing clinic's interest in mentioning the Better Business Bureau, an injunction permitting use of the word with disclaimer is mandated by the first amendment, if any injunctive relief whatsoever is permissible. *See also, Virginia Board of Pharmacy supra* pp. 14-15, in which the Supreme Court noted as to false advertising cases that it may be "appropriate to require that a commerical message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive", 425 U.S. at 772 n.24, but noting that the prohibition of "prior restraints" of the first amendment will generally prevent prohibitory injunctions in such cases, unless *irreparable* harm of false advertising can be shown.

B. No injunction requiring a disclaimer is necessary, in that defendants agreed and remain willing to accompany any future use of "Olympic" with a disclaimer.

Defendants note that they agreed to use a disclaimer of any association with USOC in February 1982, in writing, and they remain willing to abide by that assurance in any future use of "Olympic". (See Dec.R.Kline Sup.Mo.Prelim.Inj. Ex's C & D). Because defendants remain willing to abide by that assurance voluntarily, without necessitating any court order, there is no need for any permanent injunction in this case. Injunctive relief is only available, as a matter of equity, where a party otherwise will act to violate the would-be terms of the injunction, or where there is some demonstrable danger of such violation. Where declaratory relief suffices to resolve the matter, also, injunctive relieve is improper. *See e.g., Doe v. Bolton*, 410 U.S. 179, 188-189 (1973); "Developments in the Law: Declaratory Judgments - 1941-1949", 62 *Harv.L.Rev.* 787, 805-817 (1949). Even assuming *arguendo* that this Court were to find a summary judgment in favor of plaintiffs in this case to be warranted, in spite of the triable disputes of material fact that permeate the action, and in spite of the considerable authority that would entitle defendants to judgment in this action, the sole type of permanent injunction that would be proper under the first amendment—one requiring a disclaimer or warning by SFAA—is unnecessary and improper in this action, because defendants already have agreed and they here reiterate the agreement to provide disclaimers of association with USOC and the Olympics in any materials or property that use the word "Olympic".

VI. CONCLUSION

For the reasons presented above, the motion by plantiffs for summary judgment should be denied, and the action set for trial.

Dated: 3 October 1983

Respectfully submitted,

By: Mary C. Dunlap (Signed)
An Attorney for Defendants and
Cross-Complainants SFAA & Dr. Waddell

(Certificate of service omitted in printing.)

File Date: October 3, 1983

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Mary C. Dunlap In Opposition to Plaintiff's Motion for Summary Judgment

I, MARY C. DUNLAP, do hereby declare under penalty of perjury:

1. I am an attorney of record for defendants in the above captioned action.

2. The documents attached hereto as the following exhibits are true and correct copies of documents produced by plaintiffs in response to defendants' first request for production of documents:

EXHIBIT A: Note and article to Richard G. Kline
EXHIBIT B: Correspondence between Monique Berlioux of IOC and Mr. Douglas Roby
EXHIBIT C: Correspondence with Mr. Darwin Mittelstaedt

3. If called to testify I would competently testify to the above.

Dated: October 3, 1983

Mary C. Dunlap (Signed)

Dick,

In follow up to our discussion over the hot fudge sundae last week in Indianapolis. I found the enclosed article in the SF Chronicle of 7/28.

I believe the article says quite a bit. We may not like it, but it's the way San Francisco is looking at it.

Regards,
Bob (signed)

(Articles omitted in printing. Articles are in Record, Docket #78.)

EXHIBIT A p. 1
to Declaration of Mary C. Dunlap

Mr. Douglas ROBY
Fairview
6100 Geddes Road

YPSILANTI
Michigan 48197
U.S.A.

Lausanne, 2nd August 1982
Ref. no 6151/82/nmm

Re: "Gay Olympics"

Dear Mr. Roby,

Thank you very much for your letter and enclosure of 21st July, 1982.

We are well aware of this unfortunate situation regarding the proposed "Gay Olympics" in the United States. We have been in close communication with the USOC on this matter and can assure you they will have the full support of the IOC should they decide to proceed with legal action to obtain an injunction prohibiting further use of the word "Olympics" by this organisation.

Thank you again for providing us with the news cutting and for expressing your concern on this matter.

Best regards.

Yours sincerely,

Monique BERLIOUX
Director

EXHIBIT B p. 1
to Declaration of Mary C. Dunlap

Douglas F. Roby
Fairview
6100 Geddes Road
Ypsilanti, Michigan 48197
(313) 482-1093

July 21, 1982

Dear Madame Berlioux:

I am enclosing to you copy of news article in the "Detroit Free Press" of this date, regarding "GAY OLYMPICS".

I suppose you know that the word "GAYS", in this country means "HOMOSEXUALS".

In recent years these people have come out *in* the *open* in many ways and seem to be attempting to have "SODOMY", considered as a virtue.

I called Don Miller, on the phone today to make sure that he is aware that the U.S.O.C. attorneys are seeking an "INJUNCTION" in the court of law.

With best regards,

Cordially,
Douglas F. Roby (signed)

EXHIBIT B p. 2
to Declaration of Mary C. Dunlap

Mr. Darwin MITTELSTAEDT
1505 North Franklin Place
MILWAUKEE, Wisconsin 53202
U.S.A.

Lausanne, 2nd March 1982
Ref. no 1932/82/GS/ab

Re: "Gay Olympic Games"

Dear Mr. Mittelstaedt,

Thank you for your letter of 11th February 1982.

The IOC fully approves the position adopted by the United States Olympic Committee and draws your attention to the fact that the Olympic terminology is protected in the USA by Section 110 of the Amateur Sports Act, 1978, so that any user of the word "Olympic" needs the prior consent of the appropriate authority.

This consent is not unreasonably withheld, as is shown by the examples quoted in your letter.

Yours sincerely,

Monique BERLIOUX
Director

cc. Colonel F. Don MILLER
bcc. Mr. Georges STRASCHNOV

EXHIBIT C p. 1
to Declaration of Mary C. Dunlap

February 11, 1982

Monique Berlioux, Director
International Olympic Committee
Chateau de Vidy
CH-1007 Lausanne Switzerland

M. Berlioux,

Enclosed is a copy of a letter I have sent today to Mr. Miller of the United States Olympic Committee.

I thought I might bring to your attention the concern I feel for this situation.

Thank you.

With sincerity,

Darwin Mittelstaedt (Signed)

1505 North Franklin Place
Milwaukee, Wisc 53202
USA

EXHIBIT C p. 2
to Declaration of Mary C. Dunlap

EXHIBIT C p. 3
to Declaration of Mary C. Dunlap

February 11, 1982

F. Don Miller, Executive Director
United States Olympic Committee
1750 East Boulder Street
Colorado Springs, CO 80909

Mr. Miller,

I have read about the warning you sent to the people of the Gay Olympic Games in San Francisco. It is very disappointing to find that the Olympic Committee is so unyielding in guarding exclusive rights to the title "Olympics."

It also seems a blatant instance of discrimination, which angers and offends. Gays cannot be the only group you have advised of your potential for legal action, but these people ought to be given a chance to personally state their case to you.

Gays have as much right to the word "Olympic" as do the mental retarded and police officers.

(Personally, I believe that the word must belong to posterity as well as to history. Certainly it will be as dignifiaby treated in public use as by the hack advertisers of sports equipment and lemonade beverages.)

Please reconsider your position on the gay peoples' ban. Your sense of fair play is being invited and appealed to.

Most respectfully,

Darwin Mittelstaedt, (Signed)

File Date: October 7, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment

I. SECTION 380 PROHIBITS USE OF THE TERM "OLYMPIC" HERE WITHOUT REGARD TO A FINDING OF CONFUSION.

Defendants incorrectly contend that in order to grant plaintiffs summary judgment, the Court must hold that section 380 prohibits defendants' use of "Olympic" without regard to any "tendency to cause confusion." There is, as noted in our opening memorandum (pp. 6-8), substantial authority to support the Ninth Circuit's suggestion (Mem.Opn., p. 3 fn.) that section 380 prohibits use of the term "Olympic" for certain purposes regardless of a "tendency to cause confusion." Defendants erroneously argue that such a reading of section 380 would be unconstitutional, but they cite no applicable authority. The Ninth Circuit's rationale for rejecting defendant's constitutional attack on the preliminary injunction—that "[t]here is no first amendment right to use the word 'Olympic' in the title of [defendants'] games so long as there are other adequate means by which [defendants] can communicate their message"—applies with equal force to defendants' constitutional argument here.

The case of *Stop the Olympic Prison* v. *U.S. Olympic Com.* (S.D.N.Y. 1980) 489 F.Supp. 1112 is not to the contrary. There the court rejected an enforcement claim under section 380 because the alleged infringer was not using the term "for the purpose of trade," or "to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition" (489 F.Supp. at 1121). Here, by contrast, it is undisputed that defendants were using Olympic terminology for such purposes, and the proscription of the statute is thus plainly applicable.

Defendants attempt to avoid this result by claiming that their use is a "combination or simulation," to which the "tendency to cause confusion" standard applies, because their use of Olympic terminology is in combination with the word "Gay." To so twist the statute would render section 380 protections meaningless.* Moreover, the record is replete with defendants' descriptions of "Olympic" T-shirts, buttons, emblems and headquarters without the preceding term "Gay" (Waddell Decl., and supporting exhibits; Miller Aff., Exh. C).

II. IN ANY EVENT, THE UNDISPUTED EVIDENCE ESTABLISHES A TENDENCY TO CAUSE CONFUSION.

Even if the Court were to hold that a "tendency to cause confusion" must be shown in this case, there is sufficient, undisputed evidence to meet this standard.

Defendants contend that summary judgment is inappropriate because the question whether their use tended to cause confusion is a material fact at issue in the case (Def.Mem., p. 6). While the determination of the factors relevant to this standard may involve a factual inquiry, the conclusion whether a tendency to cause confusion has been established is a legal determination (*Golden Door, Inc.* v. *Odisho* (9 Cir.

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*Under defendants' view, an athletic event promoted as the "Olympic Games" would not be subject to the stricter proscriptions of the statute, but instead would have to be tested under the tendency to cause confusion standard, whereas an event promoted as the "Olympics" would be so tested.

1980) 646 F.2d 347, 350). Defendants cannot resist summary judgment simply by registering their disagreement with a question of law.

From all the undisputed facts we listed to support a finding of a tendency to cause confusion (Pl.Opng.Mem., pp. 4-5), defendants' only dispute is a semantic one. Defendants take issue with our choice of words in stating that participation in the Gay Games without regard to the participants' sexual orientations or preferences reflects an intent to "sever" the games from the gay community (Def. Mem., pp. 6-9). Yet defendants concede the very point: their games, like the Olympics, are open to all (Compare: Defs.Mem., P. 7, lines 23-24 with Miller Aff., p. 3). Defendants' quibble is too trivial to preclude summary judgment. In light of the abundant evidence relevant to the confusion issue—all of which is undisputed by defendants—summary judgment under section 380 is plainly appropriate.

III. DEFENDANTS' "FAIR USE" ARGUMENT IS INAPPLICABLE.

Defendants' "fair use" argument is simply another species of the argument that section 380 is unconstitutional. Section 380 incorporates the *remedies* of the Lanham Act, but it does not incorporate the *defenses* of that statute. Congress has already decided, in effect, that the term "Olympic" is not generic or descriptive when used in certain contexts as are presented here, or, in any event, that plaintiffs are nevertheless entitled to exclusive use of the term. To contest this right, defendants would have to show that the statute is unconstitutional. Defendants do not even allege this much, contending instead that the statute may be unconstitutitonal only as applied to them. In any event, the Ninth Circuit in this case has already considered and rejected any claim of unconstitutionality.

IV. DEFENDANTS' COUNTERCLAIMS DO NOT RAISE TRIABLE ISSUES OF FACT.

Defendants' counterclaims are premised entirely on a finding that issuance of the preliminary injunction was improper. Defendants claim that their First Amendment rights were violated (an issue laid to rest by the Ninth Circuit), and that plaintiffs are guilty of "unconstitutional discrimination" in witholding consent of use of the term "Olympic" and in prosecuting this action.

The undisputed evidence shows that these claims are completely unfounded. First, defendants' activities are plainly within the ambit of the statutory proscriptions and subject to the relief provided for therein. Second, the abundant evidence on the similarities of defendants' activities to the Olympic Games makes this an obviously suitable case for enforcement. Third, the undisputed evidence of plaintiffs' other enforcement efforts establishes that no discrimination has occurred here.*

Accordingly, summary judgment is also appropriate with respect to the claims in defendants' counterclaim.

V. DEFENDANTS' OVERBREADTH AND DISCLAIMER ARGUMENTS ARE WITHOUT MERIT.

Defendants' arguments that the injunction is or would be overbroad as a violation of the First Amendment or as failing to permit the use of a disclaimer have already been briefed to and rejected by the Ninth Circuit ("The injunction accords with the provisions of 36 U.S.C. § 380 and is not overbroad"). These arguments should be rejected again now.

Better Business Bureau, etc. v. *Medical Directors* (5 Cir. 1982) 681 F.2d 397, upon which defendants rely, does not support the use of the term "Olympics" to describe defendants' games or the use of that name or its symbols in selling products. On the contrary, the court affirmed an injunction *against* use of the Better Business Bureau trademark. It modified that injunction to permit a factually correct statement which incidentally mentioned the Better Business

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*Plaintiffs, of course, do not concede that an affirmative claim for relief exists for allegedly discriminating enforcement under the statute, and defendants cite no authority supporting such a proposition.

Bureau provided there was a disclaimer of approval by the Bureau. As the Ninth Circuit noted, the preliminary injunction did not prevent defendants from making factually correct statements about the Olympics. Nor does the proposed permanent injunction. There is also no support for defendants' argument in *In Re R.M.J.* (1982) 455 U.S. 191. The Supreme Court in that case recognized that "[m]isleading advertising may be prohibited entirely" (455 U.S. 203). The undisputed evidence on the confusion issue in this case makes defendants' reliance on *In re R. M. J.* futile.

The disclaimer argument is similarly unavailing. Allowing defendants to use "Olympic" while disclaiming association with the Olympic Committee would eviscerate the Amateur Sports Act, which requires the Olympic Committee's consent to use "Olympic" designations to promote athletic competitions. If permitted, anyone could circumvent the law and use "Olympic" designations without obtaining permission of the Olympic Committee merely by disclaiming any affiliation. This would not only impair the requirement for authentication by the Olympic Committee, but also make it impossible to control any misuse of "Olympic" and would seriously interfere with the purpose of the Act: to finance the Olympic Committee's activities from private sources through licensing of "Olympic." It would be inconsistent with this purpose to protect unauthorized users, such as defendants, by adopting their suggestion of a disclaimer.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our opening memorandum, plaintiffs' motion for summary judgment on the complaint and counterclaim should be granted.

Dated: October 7, 1983

Respectfully submitted,

(Names omitted.)
By ROBERT A. GORDON (Signed)
Attorneys for Plaintiffs
International Olympic Committee
and Unitd States Olympic Committee

(Certificate of service omitted.)

File Date: February 2, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE J.P. VUKASIN, JUDGE

INTERNATIONAL OLYMPIC COMMITTEE,
ETC., AND UNITED STATES OLYMPIC
COMMITTEE, ETC.,

PLAINTIFFS AND
CROSS-DEFENDANTS,

VS.

SAN FRANCISCO ARTS & ATHLETICS,
INC., AND DR. THOMAS WADDELL,

DEFENDANTS AND
CROSS-PLAINTIFFS.

No. C-82-4183-JPV
San Francisco, California
Hearing on Motion for Summary Judgment:
Reporter's Transcript
By Vivian A. Pella

APPEARANCES:

FOR PLAINTIFFS:

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Thursday, February 2, 1984 **Morning Session**

The Clerk: Calling Civil Matter C-82-4183, International Olympic Committee versus San Francisco Arts & Athletics, Inc.

Will counsel please step forward and state their appearances.

Mr. Walker: Good morning, your Honor —

The Court: Just a minute, please. I'm going to ask all counsel to step forward. Step to the microphone and introduce yourselves. State your name slowly and clearly and spell it.

Mr. Walker: Good morning, your honor. My name is Vaughn, V-A-U-G-H-N, Walker, W-A-L-K-E-R. I represent the plaintiffs.

The Court: Thank you, Mr. Walker.

Mr. Walker: With me is Robert Gordon, G-O-R-D-O-N.

The Court: Thank you.

Ms. Dunlap: Good morning, your Honor. Mary Dunlap,

***Ms. Dunlap:** (cont.):* D-U-N-L-A-P, representing the defendants and with me is Dr. Thomas Waddell who is one of the defendants in the action.

The Court: Who's that?

Ms. Dunlap: Dr. Thomas Waddell. He's one of the defendants in the action.

The Court: Thank you.

Ms. Dunlap: Thank you, your Honor.

The Court: All right. The matter is on this morning's calendar and it has been described variously as plaintiff's motion for summary judgment or plaintiff's motion for an Order making the preliminary injunction heretofore issued a permanent injunction, is that right?

Mr. Walker: I think that's a fair description, your Honor, of the effect of granting summary judgment in this matter.

The relief we seek is injunctive relief and nothing but injunctive relief.

This Court has previously issued a preliminary injunction which was presently in effect and binding upon the defendants. That determination has been affirmed by the Ninth Circuit. The —

The Court: There was a preliminary injunction —

Mr. Walker: Yes, sir.

The Court: —Enjoining defendants from using the word "Olympics" —

Mr. Walker: That is correct, your Honor.

The Court: — In connection with the athletic context that they were proposing?

Mr. Walker: That is correct.

The Court: And that preliminary injunction was appealed to the Ninth Circuit —

Mr. Walker: That's correct.

The Court: — And affirmed?

Mr. Walker: That's correct.

The Court: And now you're seeking that the preliminary injunction be made permanent and that summary judgment be granted?

Mr. Walker: That's correct, your Honor.

The Court: You're the moving party. Do you want to say anything in addition to what your papers have said to the Court?

Mr. Walker: I would say only this, your Honor, reserving of course the right of replying to any arguments made by the defendant.

The Ninth Circuit's opinion in this case, I believe, has set forth the law with respect to Section 380 of the Amateur Sports Act and has determined that the Act itself is constitutional, that it applies to the conduct of commercial, theatrical or athletic performances in which Olympic terminology and its symbols are used. And that certainly is what the defendants have sought to use Olympic terminology for. There's no dispute about that. And I think there is no dispute about any of the other factual issues in the lawsuit as distinguished of course what the legal issues are where there was a dispute where that — which the Ninth Circuit has ruled in the plaintiffs' favor.

So I would not add anything other than perhaps the one observation, your Honor: The defendants have stated in their papers that somehow or other this case is different from many other cases in which Olympic terminology is infringed upon for commercial purposes, because the purposes here are "laudatory" as Judge Peckham stated, to project a more realistic view of homosexuals. But a worthy cause use of Olympic terminology is just as prohibited by the Amateur Sports Act as a commercial use as witnessed the fact that the Olympic Committee has compliance with the Act by the March of Dimes and the Muscular Dystrophy Organization which has sought to use Olympic terminology and symbols for their laudatory purposes as well. I think that has a bearing on the Court's decision.

The Court: Ms. Dunlap?

Ms. Dunlap: Thank you, your Honor. The motion of plaintiffs' in this matter represents a real misuse of summary judgment law. Rule 56 of the Federal Rules of Civil

Ms. Dunlap: (cont.): Procedure requires that in order for a party to receive summary judgment, to put it colloquially, to win without a trial, there must be no triable dispute of material fact, and that party much be entitled to judgment as a matter of law.

The case at bar is simply replete with issues of material fact that are not only triable but that must be disposed of on the merits if justice is to be done and if the law is to be applied.

It is the essential position of the plaintiffs in this matter that the defendants' use of the word "Olympic" in conjunction with the Gay Games of 1982 or on the face of it or without further inquiry violates Section 380 of 36 U.S. Code what's known as the Amateur Sports Act.

But any even superficial examination of that law reveals that the use of the term "Olympic" must tend to cause confusion, mistake, deception or false suggestion of some relationship between the user's activity and the Olympic Games or the Olympic Committee.

In the case at bar we submit, and we've briefed the issue, but I want to reemphasize it, that the U.S. Olympic Committee has never proved "a tendency to confuse" in this case. Judge Peckham used the word "presume" in finding a preliminary injunction appropriate. He certainly did not find that the defendants had proved a "tendency to confuse." And as long as there's a dispute of material fact as to that particular issue this case cannot be disposed of if the Rules are to be follosed without a trial.

Also integral to the determination by this Court of whether or not Section 380 has been violated and whether or not a permanent injunction is proper is the question of the defendants' intent in the use of the word. I rely upon the Ninth Circuit's decision in *A.M.F. vs. Sleekcraft Boats* for the proposition that evidence of partys' intent and purpose in using an otherwise trademark term is crucial in determining whether infringement has occurred and what the remedies should be.

Accordingly, Mr. Walker's position that somehow the

***Ms. Dunlap:** (cont.):* purposes of the Gay Games sponsors in using the word "Olympic" are irrelevant or umimportant in the determination of whether or not there has been an infringement is not only unsupported but contradicted by relevant law.

This Court has before it a difficult dispute in which it's plain on the face of it that the word "Olympic" is generic, and had the purpose of the Act not been to bestow trademark upon the U.S. Olympic Committee, it's very plain from the legislative history of the Amateur Sports Act that the U.S. Olympic Committee would have no right to go to court whatsoever to defend its trademark.

What are the boundaries on that right to defendants' trademark? We sumbit that the outer boundary is the U.S. Olympic Committee cannot, under any circumstances, have an injunction that requires another party not to use the word whatsoever. We have submitted, and I reemphasize at this point, that even were this Court to find that there's no triable dispute of the material facts as to the tendency to confuse, as to the intent of the parties, as to the state action which is crucial to the constitutional questions, as to whether there's been discrimination, and I offer in that regard that there's never been any rebuttal by the U.S. Olympic Committee.

For example, the Police Olympics, an international competition featuring athletic events using five rings, I understand two of them are handcuffs, but they're rings all the same, has not been in any way brought to account for its obvious — in the U.S. Olympic Committee's definition infringement of a trademark.

In short, your Honor, this case is also replete with triable and profound issues of material fact as to discrimination and as to the requirement not only that the U.S. Olympic Commitee not discriminate in performing their governmental function, but that the Court not discriminate in performing the governmental function of deciding whether to issue an injunction and what the terms of that injunction might be.

My clients find themselves in the rather awkward position

***Ms. Dunlap**: (cont.)*: of being treated worse than a commercial trademark infringer whose purpose would be shown to be mislead the public. And in this regard the case law, the *Better Business Bureau* case, *In Re*, I think it's *R.M.J.*, I think those initials can be used, and in other cases which we cite with the proposition of which the Supreme Court has underscored that even in a case where an injunction is appropriate, that injunction must be tailored to avoid the invasion of first amendment rights has not been applied to this case.

So there is a body of well-developed trademark law and a body of well-developed constitutional law neither of which body of law has been employed to resolve the dispute now before the Court in a manner consistent with the principles stated in that body of law.

My clients indeed are in the difficult position of having it be almost impossible to explain the results in this case were summary judgment granted without reference to something other than the facts, other than the law and other than justice, namely, perhaps the prestige that we know of the United States Olympic Committee, the International Olympic Committee, and the love that people cherish the world around for the Olympic events.

Now, those factors, those public interest factors, those political factors if the Court wishes to call them, that surely ought to make a difference in the case. It surely matters that the U.S. Olympic Committee comes before this Court seeking to protect a trademark on the basis of which it finances the U.S. —

***The Court**:* On the basis of what? I didn't hear you.

***Ms. Dunlap**:* The U.S. Olympic Committee comes before this Court seeking to protect a trademark on the basis of which it finances the U.S.'s participation in the Olympic Games. There is no question that the interest with the U.S. Olympic Committee —

***The Court**:* Excuse me. Excuse me.

***Ms. Dunlap**:* Yes, your Honor.

The Court: I'm going to have to ask you to slow down a little bit.

Ms. Dunlap: I'm sorry.

The Court: I'm having trouble understanding —

Ms. Dunlap: Yes.

The Court: — What you're saying.

Ms. Dunlap: Okay.

The Court: And if I'm having trouble understanding what you're saying I can't help but believe that the best court reporter in the world might even be having trouble understanding you.

Ms. Dunlap: Fair enough, your Honor. I apologize to the Court and to the court reporter. Let me slow down.

The U.S. Olympic Committee has a vital interest, no question about it, in the use of the term "Olympic." At the same time that vital interest cannot be held to disguise or minimize the interest of every citizen in the full and fair enforcement of the first amendment; the interest of every citizen in the equal enforcement of trademark law.

Let me make one observation in that regard. Throughout this litigation there has been a blitheful disregard of the defendants' serious and litigatable and colorable trademark law-based defense. Defendants claim in this case, among other things, that they have a right specifically spelled out in Section 1115(b)(4) of the Lanham Act to fairly use the term "Olympic" in description. And "Olympic" was used in conjunction with the Gay Games to describe not as a noun but as a description or as an adjective to describe those events that would occur at the Games.

The descriptive use of an otherwise — in context to the trademark term is specifically protected under the Trademark Act and that all matters here at this juncture —

The Court: Wait a minute. I have to interrupt you.

You're saying something that I have trouble with. You're talking Trademark Act and trademark law, trademark policies and philosophies of this country. But we have a unique situation here which takes it out of the typical

***The Court:** (cont.)*: trademark-type of litigation.

You have the Amateur Sports Act of 1978 and specifically the Section 380 of that Act which *inter alia* rests in the U.S.O.C. exclusive rights to the term "Olympic" and imposes civil liability under the Trademark Act, under the Trademark Act not under the Amateur Sports Act. But it imposes civil liability under the Trademark Act upon any person who uses such term without U.S.O.C. consent to promote any athletic performance or competition.

So it's not a typical Trademark Act case. The plaintiffs here are seeking to enforce a law enacted by the Congress of the United States of 1978 which creates a unique and different situation, a typical industrial or commercial-type trademark dispute.

Ms. Dunlap: Well, your Honor, there are two difficulties with that mode of analysis in the plaintiffs' position in this case. The first which I think is an overwhelming difficulty is that in the Court's reading of the Act the Court has omitted the language causing — tending to cause confusion, mistake, deception or false suggestion. The bottom line tests of impropriety —

The Court: Just a minute. Just a minute. I'm not ignoring or tending to cause confusion standard but hasn't the Ninth Circuit already ruled on that in the appeal of this case by pointing out — reading the confusion standard as modifying the plain term "Olympic" to use their word "awkward construction"?

Ms. Dunlap: Well, your Honor, I don't believe they have ruled on that question for two reasons:

The first is that they were not presented in the appeal on the preliminary injunction. With the case on the merits that is to say they were not presented with all the evidence by both sides presented by both parties by means of adversary proceeding as to whether a "tendency to confuse" has been proved.

Secondly, their interpretation of the statute necessarily would read out the language tending to cause confusion. In

***Ms. Dunlap:** (cont.):* any case if they were to be interpreted to me that the U.S. Olympic Committee could cause any individual under any circumstances who came within the framework of using the word to promote or for trade, from any use of the word Olympic. If that were Congress' intent then why would they have modified the trademark rights that they bestowed by requiring — tending to cause confusion, mistake and so forth would be proved.

In short, your Honor, to ignore that the Lanham Act must be interpreted harmoniously where the Amateur Sports Act is to put aside that the U.S. Olympic Committee was not giving a right under Section 380 to preclude all uses even all commercial uses of the word Olympic, but was only given the right of action upon a potentially infringing use.

In short, your Honor, what Congress certainly did not do is that it did not entitle the U.S. Olympic Committee to bypass civil procedure such as it could go to court without a trial and without a contest and walk in and say they're using the word "Olympic" in a context which although not to profit involves an element of commerce and that's the end of the matter.

I believe that there are very good reasons to require that the interpretation of Section 380 be harmonious with the interpretation of the Lanham Act.

Let me go further, your Honor. If it were the position of the Court that the Ninth Circuit has said that Congress may give away a word by bestowing a trademark appointed entity for that word then there would be a most serious and profound constitutional question of a first amendment nature as to the power of Congress to do so. We have not reached that dispute yet in this case because there are a series of both trademark and constitutional law-based defenses and counterclaims to the U.S. Olympic Committee's position that must first be disposed of factually and by trial before one reaches that question.

But the ultimate underlying and I will say overwhelming constitutional issue in this case when all others are disposed

Ms. Dunlap: *(cont.)*: of is whether Congress has a right to give an entity even as prestigious and as powerful as the U.S. Olympic Committee a word, and the word let me add that is more ancient, far more ancient, twenty-seven hundred years old if one trusts the *Oxford English Dictionary*, that a word that is far more ancient and far more generic than many words such as "monopoly" and "opry" and other words which in fact have been found not to be, in spite of being protectable, not to be subject to an absolute protection on the part of the party having an interest in them.

Therefore, your Honor, even were this Court to find that the Ninth Circuit's dictum as to "tendency to confuse" is convincing in its statutory logic and we believe for the reasons I presented in my brief, that very logic puts the Amateur Sports Act on a headlong collision course with the first amendment.

The Court: To be decided by a court higher than this one.

Ms. Dunlap: It will be decided by this one in the first instance, your Honor, and then I suppose we go higher. But we start with the trial court and we start with the realization that the trial court must decide the factual questions related to a constitutional dispute as readily as it must decide on this question related to a statutory dispute.

The Court: Okay.

Ms. Dunlap: Thank you, your Honor.

The Court: Thank you.

Mr. Walker, rebuttal?

Mr. Walker: Very briefly, your Honor.

We are not marching into this Court seeking to obtain a judgment in this action. It has been very seriously and heatedly contested. The trouble with defendants' argument however, the contest here is a contest about legal issues not about factual issues.

And in the argument which counsel has presented she has not pointed out what issues this Court were to try if it were to deny summary judgment and set this matter down for trial.

The "tendency to confuse" issue which she raised that is a

Mr. Walker: *(cont.):* legal question. Whether there is a "tendency to confuse" or not, the facts from which the Court makes that determination have not been contested. It's not been contested, for example, that the defendants' games are open to all participants just like the Olympic Games are without regard to race, or sexual preference, that there's a similarity of opening ceremonies that the defendants have a torch lighting and carrying ceremony, very similar to that which the Olympic Games have. That there's a similarity of events that the participants march behind the banners of their countries or cities. That the games are international in scope and that the winners are awarded gold, silver and bronze medals just like the Olympics. None of those matters, which are factual matters, are not in dispute.

Ms. Dunlap indicated that — again indicated her disagreement with what Congress has done by the Amateur Sports Act by, as she put it, taking a "generic" term that's several thousand years old and giving right to use a private organization such as the United States Olympic Committee. But whether that's valid or not was determined by the Ninth Circuit when they determined that the Amateur Sports Act is constitutional.

So there isn't any infringement upon "generic" use here.

And finally, counsel has conceded that the reservation of use of the term "Olympic" and Olympic symbols to the U.S.O.C. is vital to their purpsoes and vital to carrying out those purposes.

The United States Olympic Games are the games that are supported by private sources of financing rather than by governmental sources of financing. And the use therefore of these terms in commercial applications, licensing as the U.S.O.C. does to raise funds to support American athletes in the Olympic Games is vital and it's for that reason that Congress carved out this hybrid statute, as your Honor pointed out, combining the remedies of the Lanham Trademark Act with a specifically defined liability in the Amateur Sports Act.

Mr. Walker Dunlap: *(cont.):* We believe that the facts are without dispute and the legal issues have been determined and are binding on this Court. Thank you.

The Court: Thank you. I think I'll take the matter and submit it.

Ms. Dunlap: May I offer only one observation, your Honor, and that is if the real Olympics that Mr. Walker says are opened to all participants, I intend to —

The Court: I don't think that's relevant to the argument. Thank you. The matter is submitted.

I refer to Section 380 of the Amateur Sports Act of 1978.

Falling on that reference it appeared that defendants first argue that the tending to cause confusion standard must be read in the overall prohibition on the use of the term "Olympic" to promote any athletic performance or competition and that this is a question of fact which cannot be determined on a motion for summary judgment.

Secondly, they argue that even if this standard is not read in the use of the term "Gay Games" in connection with "Olympic," is a combination under a subsection of Section 380 in invoking the allegedly factual "tending to cause confusion" standard.

Regarding first contention that "tending to cause confusion" standard should not be applied to the basic promotion of athletic contests, the dramatical construction and plain meaning of the statute indicates that this alone is sufficient violation to impose liability.

The reference already made to the opinion of the Ninth Circuit any other interpretration will be deemed "inawkward construction."

Defendants' other claim is also without merit to infer that Gay Olympic Games is a combination requiring the U.S.O.C. to prove "tendency to cause confusion" distorts the Congressional intent that an authorized use of the term "Olympic" does not require proof of such tendency otherwise obviously the U.S.O.C. would be compelled to present, I

The Court: *(cont.):* would say, such proof whenever an infringer uses the word "Olympic" by any other word.

Defendants contended that their use of the "Olympic" constitutes a quote "fair use" unquote defense under the Trademark Act. This Court's reading of Section 380 indicates that 380 incorporates only the remedies of the Trademark Act and nothing in the language or the legislative history of Section 380 indicates that the Trademark Act's defenses were to be incorporated as well.

Defendants have claimed that the U.S.O.C. is a governmental actor subject to certain constitutional scrutiny. The only case to have dealt with this question expressly found that that doctrine did not file.

Defendants also have contended as a defense the alleged violation of their first amendment rights and 14th amendment rights. These arguments can be disposed of on the grounds that quote "no state action" unquote is present because the U.S.O.C. is not a governmental actor.

The defendants have contended that the proposed injunction permanently prohibiting them from using the term "Olympic" is too broad.

They also contend that they should be allowed to use that word with a suitable disclaimer. I think it's the opinion of this Court that this argument would undermine the purpose of the Amateur Sports Act of 1978 and, in effect, with countenance allowing any infringer, however objectionable, to use "Olympic," so long as it expressly disallowed any connection with the U.S.O.C.

It appears to this Court that there are no triable issues of fact. Summary judgment shall be granted in favor of the plaintiffs and a preliminary injunction is hereby made permanent.

Thank you very much.

Mr. Walker: Thank you, your Honor.

Shall we prepare a judgment, your Honor?

The Court: Yes. You prepare the judgment.

Mr. Walker: Thank you.
The Court: Thank you. The Court is in recess.

(Reporter's certificate omitted.)

File Date: Febuary 16, 1984

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE,
a corporation organized and
existing under the laws of
Switzerland; UNITED STATES
OLYMPIC COMMITTEE, a corporation
organized and existing under the
laws of the United States of America,

Plaintiffs,

vs.

SAN FRANCISCO ARTS & ATHLETICS,
a California corporation;
THOMAS F. WADDELL,

Defendants.

No. C-82-4183 J.P.V.

Order Granting Plaintiffs' Motion for Summary Judgment on the Complaint and Counterclaim

Plaintiffs' motion for summary judgment on the complaint and counterclaim came on for hearing on February 2, 1984. Counsel were heard and the contentions of the parties and the record herein were fully considered. After deliberation, the Court has determined that there is no genuine issue as to any material fact with respect to either the complaint or the counterclaims herein and that plaintiffs are entitled to judgment as a matter of law on both the complaint and defendants' counterclaims.

Now, Therefore, it is *ORDERED* that plaintiffs' motion for summary judgment is granted and that judgment be entered herein in plaintiffs' favor and against defendants on the complaint and the counterclaims with costs and disbursements to be taxed by the clerk in favor of plaintiffs and against defendants.

Dated: February 16, 1984

J.P. VUKASIN (Signed)
United States District Judge

File Date: Febuary 17, 1984

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Judgment

The judgment is reprinted as Appendix 6, pages 77-80, of the Petition for Certiorari.

File Date: Febuary 28, 1984

(Names omitted. See J.A. 1, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Entry of Judgment

To defendants San Francisco Arts & Athletics, a California corporation, and Thomas F. Waddell and their attorneys of record:

PLEASE TAKE NOTICE that judgment (a copy of which is attached hereto) was entered in the above-entitled action on February 17, 1984.

Dated: February 27, 1984.

PILLSBURY, MADISON & SUTRO
VAUGHN R. WALKER
ROBERT A. GORDON

BEVERIDGE, DeGRANDI & KLINE
RICHARD G. KLINE
EDWARD T. COLBERT

PISAR & HUHS
JOHN I. HUHS

By VAUGHN R. WALKER (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committe

File Date: March 16, 1984

(Names & caption omitted, See J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Appeal

(F.R.A.P. Rules 3(a) and 4(a)(1))

NOTICE IS HEREBY GIVEN that defendants and cross-plaintiffs appeal from the Judgment entered in the above-captioned action and counterclaim on February 17, 1984, to the United States Court of Appeals for the Ninth Circuit. This notice is filed pursuant to Rules 3(a) and 4(a) (1) of the

II-275

Federal Rules of Appellate Procedure.

Dated: 16 February 1984

Mary C. Dunlap (Signed)
Attorney for Defendants and
Cross-plaintiffs

File Date: April 16, 1984

(Names & caption omitted, See J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Motion and Motion for an Award of Attorney's Fees

(36 U.S.C. § 380, 15 U.S.C. § 1117)

To defendants above-named and to their attorneys of record:

PLEASE TAKE NOTICE that on May 17, 1984, at 10 A.M. or as soon thereafter as the matter may be heard before the Honorable John P. Vukasin in Courtroom 10 of the above-entitled court, plaintiffs above named will move the Court for an award of attorneys' fees. This motion is made pursuant to the Amateur Sports Act of 1978 (36 U.S.C. § 380) and on the grounds that:

1. An award of attorneys' fees for actions under the Amateur Sports Act of 1978 is authorized and appropriate;

2. This is an exceptional case because defendants have willfully violated the Act;

3. An award of attorneys' fees would serve the public interest because it would allow funds otherwise diverted to pay lawyers to be devoted instead to assisting American

athletes to participate in the Olympic games; and

4. An award of attorneys' fees would discourage willful violations of the Amateur Sports Act by nonprofit groups such as defendants who otherwise lack a disincentive to avoid infringement of Olympic designations.

This motion will be based upon the memorandum of points and authorities filed herewith, the declarations filed herewith and the files, records and papers herein.

Dated: April 16, 1984

(Names omitted.)

By: Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Certificate of Service omitted.)

File Date: April 16, 1984

(Names & caption omitted, See J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

(Indexes omitted.)

This memorandum is submitted in support of plaintiffs' motion for an award of attorneys' fees pursuant to the Amateur Sports Act of 1978 (P.L. 95-606, 92 Stat. 3045, 3048-3049; 36 U.S.C. § 380.)

PRELIMINARY STATEMENT

Plaintiffs seek an award of reasonable attorneys' fees in connection with this Court's judgment entered on February 17, 1984. The Amateur Sports Act, by incorporating the remedies of the Lanham Trademark Act of 1946 (60 Stat. 427; 15 U.S.C. § 1051, et seq.), provides for the recovery of attorneys' fees. Attorneys' fees should be awarded in this case because:

1. Defendants, knowing of the Sports Act's prohibition against use of Olympic designations, willfully violated the Act, forcing plaintiffs to bring this action to protect their rights.

2. USOC raises its funding through private donations and a corporate participation program whereby use of Olympic designations and symbols is authorized or licensed in return for financial support. By necessitating this action, defendants have required plaintiffs to divert funds that would otherwise have been available to support United States participation in the Olympic games and instead pay attorneys' fees. USOC's activities are devoted to supporting the development of amateur sports in this country and the participation by United States athletes in the Olympic Games.

3. An attorneys' fees award would further foster the Sports Act's purpose of protecting Olympic designations by discouraging willful violations, especially by nonprofit gadflies such as defendants which—however sincerely motivated—have no other economic disincentive to avoid interference with Olympic designations.

From August 1982, when retained, to date, USOC's principal attorneys in this matter have spent 475 hours in research, preparation of pleadings and motions, successful defense of defendants' appeal of the preliminary injunction and prosecuting the action through to judgment. The general attorneys of the USOC in Washington, D.C., have also spent in excess of 400 hours on this matter. A reasonable attorneys' fee for this work would be at least $100 per hour.[1]

I. DEFENDANTS' KNOWING INFRINGEMENT OF PROTECTED OLYMPIC DESIGNATIONS JUSTIFIES AN AWARD OF ATTORNEYS' FEES AGAINST DEFENDANTS.

A. The Amateur Sports Act allows for recovery of attorneys' fees.

The Amateur Sports Act protects the distinctiveness, value and marketability of the various terms and symbols associated with the Olympic games. The Act gives USOC exclusive right to use Olympic designations (36 U.S.C. § 380(c)) Congress endorsed and authorized USOC's corporate participation program (36 U.S.C. § 380(b)). Through that program, USOC, during the 1980-1984 quadrennium, will raise approximately $40 million (Miller Aff., filed Aug. 9, 1982, p. 1). These funds are devoted to organizing, financing and controlling United States participation in the International Olympic Games and the Pan American Games (ibid.). As the means of affording this protection, the Sports Act gives to the USOC the exclusive right in the United States to these Olympic designations.

The Sports Act expressly affords USOC the same remedies provided for in the Lanham Trademark Act to protect Olympic designations against unauthorized use (36 U.S.C. § 380 (a)). Those remedies include:

(a) injunctive relief (15 U.S.C. § 1116);
(b) damages (15 U.S.C. § 1117);
(c) accounting for profits (15 U.S.C. § 1117);
(d) award of attorneys' fees (15 U.S.C. § 1117); and
(e) destruction of infringing materials (15 U.S.C. § 1118).

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[1] The general attorneys of the IOC have also spent time on this case. Because Mr. Huhs has been out of the country, a declaration for his time spent has not yet been filed. It will be filed and served at the earliest opportunity. Mr. Huhs has spent 89 hours on this matter.

The Sports Act does not expressly set forth the standards which must be met in order to obtain the various forms of relief, but the legislative history indicates that attorneys' fees may be awarded in any case in the discretion of the court. The legislative history of the Sports Act reveals that the reference in § 380 to the Lanham Trademark Act was intended as a shorthand way of listing the kinds of relief available to the USOC for violations of the new cause of action created by the Sports Act. The version of the Sports Act that originally passed the Senate contained a section which was, in effect, essentially the same as the present § 380 (S.2727, 95th Cong., 2d Sess., 1978 Cong.Rec. S.7083, S.7102).

The Senate version contained two subsections which do not appear in § 380. The first was an express grant of jurisdiction to the district courts to hear § 380 cases. The second was a list of the remedies available for violations of the section, which included the standards to be applied in awarding the remedies. Subsection (a) of the Senate version stated that those who violate § 380 "shall be liable in a civil action by the [USOC] for the remedies provided in subsection (c) of this Section."

In the bill as enacted, the length of § 380 was reduced by eliminating the special jurisdiction and remedies provisions, and by relying instead on general Federal question jurisdiction and the relief incorporated by reference from the Trademark Act.

The reference to "the Trademark Act" was substituted for the reference to subsection (c) to conform to the House version. Nothing in the legislative history indicates that this change was meant to substantively affect the provision (1978 Cong.Rec. S.19040). Because § 380 does not set forth the standards for relief, the Senate version of subsection (c) may be examined to see what standards were intended to apply for relief under the Amateur Sports Act. That subsection provided:

"(c) When a violation of any provision of this section is established in any civil action arising under this section, the [USOC] shall be entitled to—

> "(1) obtain injunctive relief upon such terms as the court considers reasonable to prevent a violation or threatened violation of this section;
>
> "(2) recover the profits which the defendant accrued as a result of such violation;
>
> "(3) recover any damages sustained by the Corporation; and
>
> "(4) recover costs of the action, including, at the discretion of the court, the amount of reasonable attorney's fees" (1978 Cong.Rec. S.7102).

The question of whether attorneys' fees should be awarded in a given case was left to the "discretion of the court." This standard is far less restrictive than the "exceptional case" standard of the Lahnam Act.[2] In view of the knowing and willful character of the defendants' violation, attorneys' fees are recoverable under either test.

In *U.S. Olympic Committee* v. *Union Sport Apparel* (E.D.Va. 1983) 220 U.S.P.Q. 526, 531 (a copy of the opinion is attached as Exhibit A) the court applied the Lanham Act provision to award attorneys' fees under the Amateur Sports Act. The court there found that defendants' violation was a willful infringement of USOC's rights and that USOC had been forced to go to considerable expense to protect its statutory rights despite the failure of defendants to present a credible defense. These same criteria apply and compel an award of fees here.

B. Defendants' conduct represents a willful violation of the Amateur Sports Act.

The facts leading up to this lawsuit are summarized in the

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[2] This is similar to the lesser burden required by the cause of action itself. The Court has held that:

> "By its choice of 'tending' rather than 'likely', Congress must have meant to place less of a burden on a plaintiff under a Section 380 cause of action than that placed upon a plaintiff suing under the Trademark Act alone" (Ord., August 20, 1982, p. 11)

Court's Order filed August 20, 1982, setting out findings in support of the preliminary injunction. In the Order, Judge Peckham noted that when defendant San Francisco Arts & Athletics ("SFAA") was incorporated, its organizers attempted to incorporate under the name "Golden Gate Olympic Association" (Order, Aug. 20, 1982, p. 2). In the words of defendant Waddell:

> "We were told at the time the word 'Olympic' could not be used in a corporate title. We subsequently filed for incorporation on August 4, 1981, as San Francisco Arts & Athletics" (Waddell Decl., filed Aug. 16, 1982, pp. 4-5).

Defendants claim, despite this warning, to have been under the impression that they could use Olympic designations to describe the events they intended to sponsor (id., p. 5). Waddell offers no explanation for this impression but admits going forward with unauthorized use:

> "We began using the words 'Gay Olympic Games' on our letterheads and mailings and in the local gay press as early as September of 1981" (Waddell Decl., Aug. 16, 1982, p. 5).

Waddell admits a warning came from another source:

> "In mid-December 1981, I received a call from someone at the Women's Sports Foundation, who told me that *we may be in trouble*. She related that someone from the USOC had been in her office and noticed our newsletter and told her to call us" (Waddell Decl., p. 5).

On December 26, 1981, Dr. Waddell mailed a letter to F. Don Miller, Executive Director of USOC, asking for permission to use Olympic designations (Waddell Decl., Exh. A). In the meantime, USOC had learned of defendants' use of Olympic designations and on December 23, Colonel Miller wrote the Gay Olympics that such use of Olympic designations violated the Amateur Sports Act and requested cessation of that use (Waddell Decl., pp. 5-6, Exh. B; Miller Decl., Exh. A).

On January 15, 1982, Dr. Waddell and Colonel Miller talked by telephone; Miller reiterated USOC's position and his demand that defendants cease use of Olympic designations (Waddell Decl., p. 6), a "position which I readily understood" (ibid.). Dr. Waddell stated under oath:

> "On January 18, 1982 I wrote Mr. Miller (Exhibit C) responding to his request because our committee felt threatened and uncertain of our rights. We decided as an interim measure and in a spirit of legal compromise to drop 'Olympic' while we sought legal counsel" (Waddell Decl., p. 6).

The Court found that defendants by this letter had "agreed to cease permanently the use of 'Olympic'" (Ord., Aug. 20,1982, p. 4).

Waddell's letter was short and friendly, concluding with "Best wishes for a successful campaign for the 1984 Olympic Games in Los Angeles" (Waddell Decl., Exh. C). But after obtaining advice of counsel, Waddell wrote a very different letter eight days later (Waddell Decl., p. 6). In this letter, Waddell wrote Miller that USOC's request was discriminatory and on dubious legal footing (Waddell Decl., Exh. D). Later in these proceedings, defendants claimed that Waddell's January 26, 1982 letter revoked their apparent agreement to cease use of Olympic designations, a contention Judge Peckham disbelieved (Ord., Aug. 20, 1982, p. 4).

In the meantime, however, USOC's counsel, Richard G. Kline, on February 2, 1982 wrote Waddell that USOC was disturbed by Waddell's "apparent repudiation" of the prior agreement to discontinue use of Olympic designations. Kline told Waddell that USOC had declined to bring legal action to enforce its rights under the Amateur Sports Act in return for defendants' discontinuance of Olympic designations (Kline Decl., Exh. B). Defendants' counsel, Mary Dunlap, offered a "proposed accommodation" whereby defendants would use Olympic designations with a disclaimer of any association with USOC (Kline Decl., Exh. C). USOC's counsel replied with a letter dated February 22 rejecting this suggestion and reminding Ms. Dunlap that her client had already agreed to discontinue use of "Olympic" to describe the event which they proposed to conduct (Kline Decl., Exh. D). The letter concluded:

> "The United States Olympic Committee considers that the issue of the use by your client of the term 'Olympic' in connection with its proposed athletics games has been amicably resolved. Your offer to modify the pre-existing agreement to include a disclaimer is unacceptable" (ibid.).

Nothing further was heard from defendants or Ms. Dunlap (Kline Decl., p. 2).

With respect to whether or not there was an agreement by defendants to discontinue use of Olympic designations, Judge Peckham decided that issue for USOC:

> "Waddell now claims that the [January 18, 1982] letter was meant only to indicate that SFAA would cease use of the term 'olympic' as an interim compromise, pending negotiations over use of the word. We believe, to the contrary, that the letter agreed to cease permanently the use of 'Olympic' and that the 'interim measure' mentioned in the letter referred to the fact that defendants would block out 'olympic' from their old stationery and posters until such time as new printed materials could be obtained" (Order, Aug. 20, 1982, p. 4).

Although the issue of willfulness was not an element which Judge Peckham needed to determine for issuance of a preliminary injunction, he determined that it was "likely" that both defendants and USOC believed that they had "forced its wishes upon the other party" (Order, Aug. 20, 1982, p. 5). Nonetheless, evidence of defendants' willful violation of the Amateur Sports Act is apparent in the present record. In a press release revised as of July 7, 1982, defendants stated:

> "In January, 1982, the U.S. Olympic Committee based in Colorado Springs challenged the Gay Olympic Games under threat of a lawsuit to stop using the words Olympic and Olympiad. The Gay Olympic Games

> organizers expect their rights to use the words are legally justified, and, therefore, continue using the name, Gay Olympic Games" (Walker Decl., Aug. 16, 1982, Exh. B).

Defendants reportedly regarded the silence ensuing after Mr. Kline's February 22 letter as a mixed blessing; defendants, apparently, were looking for trouble. A columnist for the San Francisco Chronicle wrote:

> "Nothing more has been heard [from USOC], or is expected. For the Gay Olympics people, it's good news and bad news. They're happy to overcome an objection to their show; they're sad because they're not getting any national press" (Preston Decl., Exh. A).

Finally, defendants vigorously argued to this Court that at no time was their use of Olympic designations anything other than intentional. For example, as to Dr. Waddell's January 18, 1982 letter, defendants argued:

> "Dr. Waddell's letter to Colonel Miller of January 18, 1982, which was written to offer such a temporary grace period while defendants' found out about their legal rights and duties and tried to resolve this matter, was followed *eight (8) days afterward*, on January 26, 1982, with a letter by Dr. Waddell to Colonel Mill [sic] and USOC asserting defendants' rights and interests in continuing to use 'Olympic,' and by a letter from defendants' attorney on February 12, 1982, which declared and informed plaintiffs' attorney Mr. Kline in relevant part:
>
> > 'My client and its representatives, officers and other concerned do not intend to abandon their rights to use the term "Olympic"',
>
> "and which letter from defendants' attorney went on to refer to defendants' then-existing materials containing the word 'olympic', offering to asterisk these materials and to label them 'not associated with the U.S. Olympic Committee', *solely* as an accommodation to plaintiffs. *** Defendants plainly informed USOC of their use and intention to continue to use 'Olympic' (with or without

> the asterisk) as of defendants' attorney's letter to Mr. Kline of February 12, 1982, and defendants' use of 'Olympic' has been open from that time until the T.R.O. was issued on August 9, 1982" (Defendants' Mem.Opp.Pls'Mot.for Preliminary Injunction, Aug. 16, 1982, pp. 24-25).

Even more striking evidence of defendants' willful misconduct has recently come to plaintiffs' attention. In a new publication of defendant San Francisco Arts & Athletics (Walker Decl., filed herewith, Exh. A), which is edited by defendant Dr. Waddell, defendants promote a "1986 Lesbian/Gay Winter Olympic Games" in direct violation of this Court's preliminary injunction. (The permanent injunction was not entered until February 1984.) That publication also discloses (for the first time) that at defendants' 1982 event, the torch bearers who opened the Gay Games wore official Olympic uniforms displaying the Olympic symbol of five interlocking rings. This also violated this Court's preliminary injunction which prohibited:

> "[D]efendants *** their attorneys and representatives, from use of *** any symbol, emblem, trademark or ensignia of the International Olympic Committee or the U.S. Olympic Committee."

To add to the contemptuous nature of this act, one torch bearer was one of the attorneys representing defendants in this Court, who clearly was well aware of the Court's injunction, and as an officer of the Court, should be held to a strict standard of compliance.

II. AN AWARD OF ATTORNEYS' FEES WOULD FOSTER UNITED STATES PARTICIPATION IN THE OLYMPIC GAMES, THE PURPOSE OF THE AMATEUR SPORTS ACT.

As noted by the court in the *Union Sport Apparel* case, unauthorized use of Olympic designations frustrates the purpose of the Amateur Sports Act (*U.S. Olympic Committee v. Union Sport Apparel* (E.D.Va. 1983) 220 U.S.P.Q. 526, 529). Because USOC's funding derives from private contributions and its corporate participation program, an award of attorneys' fees here is particularly appropriate:

> "Requiring use of the Olympic Committee's funds to enforce the statute against those who would violate 36 U.S.C. § 380, diminishes the amount of funding available to implement the Olympic Committee's athletic programs. The public interest would best be served by having the costs necessary for enforcement of the Olympic Symbol Protection statute be borne by those who violate that statute, rather than by the public's contributions. Particularly where, as here, those expenses were caused by a recalcitrant defendant without a substantial defense. Thus, in order to allow the Olympic Committee to enforce the statute as contemplated by Congress, while at the same time maintaining its development programs, attorneys' fees should be granted liberally under the statute. Such an award of attorneys' fees is particularly appropriate where, as here, the violation has been willful and with disregard for the Olympic Committee's preemptive rights" id. at p. 529).

The infringer in *Union Apparel* was acting for profit, whereas here defendants' organization is a nonprofit one, seeking to advance what they regard as an important cause. But this difference in motivation does not suggest that defendants here should be given any special consideration in spite of their wrongful conduct. Relieving defendants of liability for USOC's attorneys' fees because they are a nonprofit organization when a profit-making group would have otherwise been held liable would simply encourage nonprofit-making groups to trade on Olympic designations for their purposes. Nonprofit-making groups should not be permitted to violate the Act with impunity.

Throughout this litigation, defendants have repeatedly referred to the existence of other nonprofit groups which they claim have infringed Olympic designations. Dr. Waddell's declaration, for example, referred to "Alcoholics

Olympics," "Armenian Olympics," "Police Olympics," "Olympics of Ballet," "Olympics of the Mind," "Crab Cooking Olympics," among others (Waddell Decl., p. 2). Although some of these allegedly infringing uses are not as serious as defendants' infringement, the problem of nonprofit-making, special interest groups or charitable gadflies misusing Olympic designations is a serious one, as defendants themselves recognize. Monitoring the activities of such groups requires substantial attention and resources of USOC (Ronald T. Rowan Decl., Aug. 16, 1982, pp.2-3). Not all nonprofit groups misusing Olympic designations are irresponsible or frivolous; some of these groups have included the March of Dimes, Birth Defects Foundation and the Muscular Dystrophy Association (Kline Decl., Sept. 16, 1983, p. 2, Exhs. N, O). An award of attorneys' fees would discourage unauthorized use of Olympic designations and plainly strengthen USOC's hand in dealing with misusers and infringers (see *Playboy Enterprises* v *Baccarat Clothing Co., Inc.* (9 Cir. 1982) 692 F.2d 1272 (holding that monetary awards against infringers are essential to deter the prohibited conduct)). This plainly would advance the statutory purpose of the Amateur Sports Act and it matters not that the infringers are serving what they regard as a worthwhile cause as opposed to simply lining their own pockets. As for the effect on the plaintiffs, it amounts to the same thing.

III. CONCLUSION

For the foregoing reasons, plaintiffs submit that this Court should award them their attorneys' fees as set forth in the declarations filed herewith.

Dated: April 16, 1984.

(Names omitted. See J.A. 5, above.)

By Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Copy of opinion in *USOC v. Union Sport Apparel,* 220 U.S.P.Q. 526 (E.D.Va. 1983) omitted in printing. Opinion is in Record, Docket #96.)

File Date: April 16, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Robert A. Gordon in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

ROBERT A. GORDON declares as follows:

1. I am a member of Pillsbury, Madison & Sutro, principal attorneys for plaintiffs in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Plaintiffs retained Pillsbury, Madison & Sutro to prosecute this action in August 1982. Since that time, attorneys of Pillsbury, Madison & Sutro have worked on this action for a total of 480 hours. Pillsbury, Madison & Sutro has actually billed plaintiffs for 480 hours of work on this case.

3. A reasonable hourly rate for the work performed on this case by plaintiffs' principal attorneys is $100 per hour. Accordingly, a reasonable attorneys' fee to be awarded plaintiffs in this action, for work performed by this law firm, is $48,000.

4. Attached hereto as Exhibit A is a true copy of a publication entitled "Triumph in 86," published and edited by defendants herein.

(Jurat omitted.)

(Exhibits omitted in printing.
Exhibits are in Record, Docket #97.)

File Date: April 16, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Joseph D. Lewis in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

JOSEPH D. LEWIS declares as follows:

1. I am a member of Beveridge, DeGrandi & Kline, attorneys for plaintiffs in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Beveridge, DeGrandi & Kline acts as general counsel to plaintiff United States Olympic Committee. Since this litigation began in August 1982 attorneys of Beveridge, DeGrandi & Kline have worked on this aciton in excess of 400 hours. Beveridge, DeGrandi & Kline has actually billed plaintiffs for over 400 hours or work on this case.

3. A reasonable hourly rate for the work performed on this case by plaintiffs' attorneys is $100 per hour. Accordingly, a reasonable attorneys' fee to be awarded to plaintiffs in this action for the work done by Beveridge, DeGrandi & kline is $40,000.

(Jurat omitted.)

File Date: April 18, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Corrigendum to Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

The following correction should be made to the Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, filed April 16, 1984:

Page 12, line 24: "Walker Decl." should be changed to "Gordon Decl."

Dated: April 18, 1984

By Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic
Committee and United States
Olympic Committee

(Names & addresses omitted, see J.A. 5 above.)

File Date: April 24, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of John I. Huhs in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

JOHN I. HUHS declares as follows:

1. I am a member of Pisar & Huhs, attorneys for plaintiff International Olympic Committee in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Our firm was instructed by the International Olympic Committee to prosecute this action in August 1982. Since that time, attorneys of Pisar & Huhs have worked on this action for a total of 89 hours. Pisar & Huhs has actually billed plaintiff International Olympic Committee for 89 hours of work on this case.

3. A resonable hourly rate for work performed on this case by plaintiff International Olympic Committee's attorneys is $100 per hour. Accordingly, a reasonable atorneys' fee to be awarded to plaintiff IOC in this action is $8,900.

(Jurat omitted.)

(Certificate of service omitted.)

File Date: May 10, 1984

(Names & caption omitted in printing, see J.A. 62, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Defendants' Memorandum of Points and Authorities in Opposition to Motion for Award of Attorneys' Fees

* * *

(Indexes omitted.)

I. THE LAW, THE FACTS AND EQUITABLE CONSIDERATIONS PRECLUDE ANY AWARD OF ATTORNEYS' FEES TO PLAINTIFFS IN THE CASE AT BAR.

A. The Test Is Not What Plaintiffs Assert

By a totally twisted, illogical and unsound "version" of the legislative history and meaning of the section 380 of the Amateur Sports Act, USOC[1] argues in effect that this Court is free to order defendants to pay USOC its attorneys' fees, without regard to the test for such awards that is set forth in the Lanham Act, 15 U.S. Code section 1117. (Pl. Memo. Supp. Mo. Atty Fees 3-6). Section 380 of the Amateur Sports Act *specifically* refers to the Lanham Act in identifying the remedies made available to USOC for trademark infringement. The test urged in its motion by USOC, to wit., that attorneys' fees may be awarded "at the discretion of the court", was not adopted by Congress in enactment of the Amateur Sports Act. The language of the Senate version of section 380 relevant to attorneys' fees was not adopted by Congress, and that rejected language was "at the discretion of the court". The version that Congress did adopt *expressly* refers to "...the remedies provided in...the Trademark Act...", 36 U.S. Code section 380(a). It is obvious that if Congress had chosen to empower courts in section 380 cases to grant attorneys' fees to USOC at "the discretion" of such courts, and without regard to the formulation of this statutory remedy under the Lanham Act, Congress had the vehicle before it to accomplish that purpose, in the form of the Senate version on this point that was not adopted. Thus USOC's effort to write itself a blank check for attorneys' fees under 36 U.S. Code section 380 fails, in that Congress elected not to do so, and elected instead to have courts hearing section 380 cases be guided by "the remedies provided in. . .the Trademark Act of 1946".

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[1] USOC is the only plaintiff referred to in this memorandum because USOC alone, and not IOC, has standing to sue under the Amateur Sports Act. *Flast v. Cohen*, 392 U.S. 83 (1968); *Sierra Club v. Morton*, 405 U.S. 727 (1972)

According to USOC's proffered reasoning on this issue, a court interpreting a federal law is free to adopt rejected language from one version of a proposed law instead of applying and interpreting the language that Congress actually chose to adopt. That is simply not how judicial construction of statutes works. A court construing a statute is not empowered to discard the statute's words in favor of other, different language that the legislative branch rejected. To hold otherwise would invite judicial superlegislation and chaos in court.

USOC's position on this point also does not make any independent sense. If its position were accepted by this Court, then this Court and all others would be free to grant or deny remedies to USOC under 36 U.S. Code section 380 without any accountability to the formulae for such remedies developed under the Lanham Act. If that had been Congress' intent, then surely Congress would not have explicitly pointed to "the remedies provided in. . .The Trademark Act" in defining the remedies available to USOC under section 380 of the Amateur Sports Act.

Moreover, in the only reported case on this issue, *USOC v. Union Sport Apparel*, 220 U.S.P.Q. 526, 531 (E.D.Va. 1983), the District Court awarded attorneys' fees "[i]n view of the *willful* infringement by defendants" and in their "failure to put forward a *credible defense*", concluding in pertinent part that "this is an exceptional case within the meaning of 15 U.S.C. sec. 1117 *as incorporated by the Amateur Sports Act of 1978...*". (emphasis added) Thus, USOC's unfounded version of the legislative history and meaning of section 380 as it pertains to attorneys' fees awards has been rejected by the only court to decide the question to date. In summary, there is no authority for the position of USOC that this Court may disregard the incorporation of the legal standards and tests for availability of attorneys' fees in trademark infringement cases into the remedies provisions of section 380, and the plaintiffs' motion for fees thus must be measured against the standards developed under 15 U.S. Code section 1117.

B. Defendants Did Not Maliciously, Fraudulently, Deliberately, Nor Willfully Infringe Plaintiffs' Trademark, And This Is Not An Exceptional Case Under 15 U.S. Code Section 1117.

No court at any stage of the instant litigation has found defendants to have engaged in malicious, fraudulent deliberate nor willful infringement of USOC's trademarks, or any of them. In issuing the preliminary injunction in this action, the District Court per Judge Peckham specifically did *not* find that defendants' use of "Olympic" would tend to "deceive", 36 U.S. Code section 380 (Order p.11 (8/20/82), nor did the District Court on that occasion find any deliberateness, willfulness nor malice in defendants' purpose in using "Olympic". Instead Judge Peckham specifically found that, in this case until the litigation was commenced, "...it [is] likely that each party was under the impression that it had forced its wishes upon the other party and that each had achieved its respective goals." (Order p.5 (8/20/82))

The record in this action is replete with evidence of the non-malicious, non-fraudulent, non-deliberate and non-willful nature of defendants' asserted trademark infringement upon the word "Olympic"[2]. The purpose of using "Olympic" was not to create confusion, deception, mistake or false suggestion of a relationship between SFA&A and its activities and USOC and the Olympic Games, nor was the purpose to trade on USOC's goodwill. (See Dec. T. Waddell, pp.2-4; M. Brown, p.2; P. Mart, p.2; E. Petersen p.2, filed in opposition to the motion by USOC for a preliminary injunction in this action (8/16/82)). Indeed, defendants' literature specifically disavowed the alleged current emphasis of "the traditional Olympics" on competitiveness (Exhibit I to Dec.T. Waddell Opp.Mo.Prelim.Inj.), and expressly distinguished SFA&A's position as to fundraising from that of USOC (Exhibit H to Dec.T. Waddell Opp. Mo.Prelim.Inj.) Defendants in this action even offered to place an express disclaimer of any affiliation with USOC or the Olympic Games on all defendants' paraphernalia; this offer was rejected by plaintiffs' attorneys. (Exhibit D to Dec.T. Waddell Opp.Mo.Prelim.Inj.) It is patently obvious upon this record that defendants at bar neither intended nor acted maliciously, fraudulently, deliberately nor willfully to infringe USOC's trademark on the term "Olympic". Oppositely, as the record cited above shows plainly, defendants neither intended nor sought to create any appearance of a connection with USOC or the Olympic Games, and defendants expressly and openly differentiated themselves and their activities from those of USOC, as specified above. Defendants' open differentiation of their activities from those of USOC, and their open criticism of USOC and the Olympic Games, puts these defendants in a very different posture in fact and in law than that of the "willful infringer" of a trademark. Willful infringers "offer...no credible explanation why they adopted a name so similar to [the trademark holder's]...other than to trade on [the holder's] widespread popularity." *Playboy Enterprises Inc. v. Chuckleberry Publishing Inc.*, 687 F.2d 563, 565 (2nd Cir. 1982). Here, oppositely, defendants have avowed without a scintilla of factual impeachment or rebuttal that they used the term "Olympic" for philosophical, symbolic and non-commercial purposes, and held no intent to trade on the "widespread popularity" of USOC and the Olympic Games in choosing the word for those distinct purposes.

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[2] Defendants use the term "asserted" here in modifying the terms "trademark infringement" for the reason that defendants do not believe that findings of infringement were warranted upon the motion for summary judgment, the resulting judgment from which is now subject to appeal.

The contrast between defendants' intent and action at bar, and the intents and actions of those who have been held liable for attorneys' fees for willful, deliberate, malicious or fraudulent trademark infringement, is vivid and poignant, this contrast should decide the instant motion against plaintiffs.

In *USOC v. Union Sport Apparel,* cited *supra*, defendant was advised by its attorneys in 1979 that it had "some exposure to claims" by USOC, and defendant nonetheless continued to market its products with the offending letters "U.S.A." and the 3-ring logo, in spite of advice from counsel, and from its purchaser Federated Department Stores, that it was acting in contravention of USOC's rights; defendant made $1.8 million in profits from this course of action. 220 U.S.P.Q. at 527-8. By contrast, defendants at bar were advised by attorney Dunlap that she believed that USOC's position was constitutionally flawed, and defendant Dr. Waddell was advised by a representative of the Northern California ACLU not to sue USOC, and that ACLU would defend Dr. Waddell et al. if USOC sued them. (Dec. T. Waddell Opp.Mo.Prelim.Inj. pp.6-7) As Judge Peckham indicated he likely would find, defendants and plaintiffs at bar *alike* believed that they had prevailed upon each other as to their viewpoints on the use of "Olympic" by defendants, as of the time period before filing of suit in this case. (Order p.5; Dec. T. Waddell p.7 lines 19-24) Putting aside the commercial profit-making purposes of defendants in the *Union Sport Apparel* case, and putting aside the absence of any constitutional or statutory defense or counterclaims in that case, both of which factors distinguish the case at bar, the state of mind of defendants in the instant case was and is not comparable to that of a willful trademark infringer such as defendant in *Union Sport Apparel*—here, unlike that case, defendants had a different purpose in using "Olympic" than a trademark infringer, and defendants had a distinct basis in legal advice to believe that their position was not that of a trademark infringer.

USOC also argues that this Court should cast aside consideration of the non-profit and non-commercial nature of defendants' activities in deciding its motion for attorneys' fees. This cannot properly be done by the Court, if it is to follow relevant law. Malicious, fraudulent, deliberate and willful trademark infringers share a fundamental common purpose—to *profit* economically by the misuse of others' trademarks. It is precisely that impermissible intent for which there is no proof at bar. Defendants at bar used "Olympic" in a non-profit, non-commercial context, to advance political, sociological and philosophical ends. (See Decs. T. Waddell, M. Brown, P. Mark, E. Petersen, S. Lewinstein & Z. Artman Opp.Mo.Prelim.Inj. (8/16/82)). These distinctly non-commercial purposes in defendants' use of "Olympic" fully differentiate their intent at bar from that of the infringer who uses a mark willfully, deliberately, fraudulently or maliciously to take advantage of its owner's goodwill, in order to *profit* by the misuse.

In *Playboy Enterprises Inc. v. Baccarat Clothing Co., Inc.*, 692 F.2d 1272 (9th Cir. 1982), for example, the Court of Appeals' reversal of the trier's determination that the case was not "exceptional" under 15 U.S. Code section 1117, for purposes of the attorneys' fee award sought, was based upon a fact situation that is powerfully different than the one presented at bar. Defendants in *Baccarat Clothing* were found to have deliberately infringed Playboy's trademarks by "premeditatedly" counterfeiting and palming off Playboy's marks. *Id.* 692 F.2d at 1276. The commercial and profit-making actions and motivations of defendants in *Baccarat Clothing* were as plain, and as crucial to the decision of the Court of Appeals as to the propriety of an attorneys' fees award in that case, as the noncommercial and nonprofit actions and motivations of the instant defendants are plain, and crucially lead to an opposite result under the reasoning of *Baccarat Clothing* as to the purpose of attorneys' fees awards under 15 U.S. Code section 1117. Plaintiffs' citation to *Baccarat Clothing* in support of their argument for attorneys' fees is totally useless to plaintiffs, for the reasons presented above.

USOC argues that "...it matters not that the infringers are serving what they regard as a worthwhile cause as opposed to simply lining their own pockets. As for the effect on the plaintiffs, it amounts to the same thing." (Pl.Memo. Supp.Mo.Atty.Fees 16) This argument is factually unsupported in the case at bar, where USOC has offered no proof of any monetary loss or damage caused to it by defendants' use of the word "Olympic". More important, this argument by USOC wholly misconstrues the content and meaning of section 1117 of the Lanham Act, as it has been written and interpreted. Section 1117 specifically rejects the "effect" test that USOC urges for awards of attorneys' fees; oppositely, section 1117 imposes an "intent" test, requiring that party seeking fees to prove that the trademark infringement was malicious, fraudulent, deliberate or willful. S.Rep. 93-1400, 93rd Cong., 2d. Sess, reprinted in [1974] U.S. Code Cong. & Admin. News, 7132, 7133, cited and discussed in *VIP Foods Inc. v. Vulcan Pet Inc.*, 675 F.2d 1106, 1107 (10th Cir. 1982)(Court of Appeals reversed attorneys' fees award of $18,535. on basis that there was no intent to violate the Lanham Act proved and no monetary loss to plaintiffs proved); *Jellibeans Inc. v. Skating Clubs of Georgia Inc.*, 716 F.2d 833, 846-7 (11th Cir. 1983) (Court of Appeals upheld denial of attorneys' fees award for trademark infringement where trier found that defendants' adoption of a similar unique, *non-generic* mark was "an honest attempt lawfully to copy a successful mark"); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1495 (11th Cir. 1983). USOC simply has failed to meet this test for availability of attorneys' fees in the case at bar.

Plaintiff USOC also seeks to contend that defendants' conduct represents a willful, deliberate trademark infringement rendering this an exceptional case under section 1117. That contention rests on a highly speculative, distorted and misleading version of purported "facts". For example, in urging that characterization, USOC quotes portions of defendant Waddell's declaration filed August 16, 1982, wrenched wholly out of context, omitting all references to the advice given to Waddell by, among others, a representative of USOC, who told Waddell that a request for permission to use "olympic" was "generally just a formality", and by two sets of legal advisers, to the effect that the defendants' uses of "Olympic" were legally protectible and would be defended. (Dec.T. Waddell Opp.Mo.Prelim.Inj. pp. 5,7). The unsupported proposition by USOC that "defendants, apparently, were looking for trouble", "based" as it is on the speculations of a newspaper columnist about defendants' states of mind, and on the questionable inference by USOC that seeking "national press" equates with "looking for trouble", stoops below all evidentiary principles and legal rules, and will not be ennobled by a response. (Pl.Memo.Supp.Mo.Atty.Fees 11) All of the remaining factual points by USOC concerning defendants' purported willfulness or deliberateness in trademark infringement concern matters arising since issuance of the temporary restraining order in this litigation, and will be discussed in Part III., of this Memorandum, below. The "facts" offered by USOC to show that defendants were deliberate or willful trademark infringers fail to show anything of the sort in the instant case.

C. Equitable Considerations Cut Decisively Against An Award of Attorneys' Fees To Be Exacted From A Nonprofit Public Interest Corporation For Its Use Of A 2700-Year-Old

Generic Word To Describe and Identify An Event Organized To Advance Human Rights And To Overcome Homophobia And Discrimination.

Monetary awards including awards of attorneys' fees in trademark infringement cases are "subject to the principles of equity", and are to be made or not made "according to the circumstances of the case", *Foxtrap Inc. v. Foxtrap Inc.*, 671 F2d 636, 642 (D.C.Cir. 1982). Even in a case determined by the court to be "exceptional" under the standards of 15 U.S. Code section 1117, "...the decision to award attorneys' fees is still within the court's discretion." *Jellibeans Inc. v. Skating Clubs of Georgia Inc.*, cited *supra*, 716 F.2d at 846-7. A grant of attorneys' fees in spite of equitable considerations obviously would constitute a clear abuse of that discretion, under section 1117 of the Lanham Act as incorporated in 36 U.S. Code section 380(a).

In the case at bar, USOC seeks to exact attorneys' fees from a nonprofit public interest corporation and, apparently, in spite of his legal immunity, from its chief officer, in a case where (1.) the defendants sought and had competent legal advice that their use of the world "Olympic" was legally and constitutionally protectible, (2.) the defendants made every effort to resolve the matter amicably, including offering to publish a disclaimer, in spite of no evidence of actual confusion, on every item of defendants' paraphernalia, (3.) the defendants were using a 2700-year-old (*Oxford English Dictionary* (2-vol, ed.)) generic term, that is used to describe and identify events, businesses and organizations all over the world (See Dec. M.Dunlap Opp.Mo.Prelim.Inj. (filed 8/16/82)), to promote a non-commercial and non-profit event, and (4.) the defendants were selected from among numerous groups that hold athletic contests and call them "Olympics", including Armenians, firefighters and police, while plaintiffs continue to permit these other groups to stage their games using "Olympics" without suits or injunctions. (Dec.T. Waddell Opp.Mo.Prelim.Inj. (8/16/82); Dec.T. Waddell Opp. Mo.Atty.Fees para. 3 and Exhibit B thereof, filed herewith).

A more inequitable situation in which to impose an admittedly punitive and exemplary monetary award would be difficult to conjure, even if USOC had proved what it failed to prove at bar—to wit., that defendants engaged in willful, deliberate trademark infringement.

USOC argues that it will be advantageous to it in policing its mark if this Court punishes defendants by awarding attorneys' fees against them. (Memo.Supp.Mo.Atty.Fees 15-16) The purpose of an attorneys' fees award under section 1117 is not to punish, much less to scapegoat—it is to remunerate the mark-holder for attorneys fees necessarily incurred in litigation against wilful, deliberate, malicious or fraudulent infringers. USOC has offered not a single reason that that purpose of section 1117 as incorporated into section 380 of the Amateur Sports Act, along with considerations of equity which must include non-discriminatory and even-handed application of law, should be cast aside in favor of punishing defendants purportedly in order to deter other charitable organizations from using "Olympic". In the case at bar, where defendants' defenses have not been interposed in bad faith, and where overriding considerations of justice not only do not warrant an award of fees, but should preclude it, the application for fees should be denied. *DC Comics Inc. v. Filmation Associates*, 486 F. Supp. 1273, 1284 (S.D.N.Y. 1980); see also cases cited in this subsection, *supra*.

II. AN AWARD OF ATTORNEYS' FEES WARRANTLESSLY WOULD PUNISH DEFENDANTS FOR LITIGATION OF SIGNIFICANT CONSTITUTIONAL AND STATUTORY QUESTIONS.

In granting USOC's motion for summary judgment in this case, this Court specifically rejected defendants' contentions that USOC was and is engaged in "state action" and thus is obligated to respect defendants' rights of free speech and equal protection of the laws. Since this Court's decision on the "state action" issue, the U.S. District Court for the Central District of California has held that USOC *is* engaged in "state action" in California relative to the 1984 Olympic Games and must comply with the equal protection guarantee of the Fourteenth Amendment. *Martin v. IOC et al.*, CV 83-5847Kn pp. 18-20 (slip opinion)(4/16/84). That ruling as to "state action" on the part of USOC in *Martin* underscores at least the colorability and potential correctness of defendants' assertion at bar, now on appeal, that USOC may be answerable to defendants for violations of their constitutional rights under the First and Fourteenth Amendments. Even assuming *arguendo* that the Court of Appeals affirms this Court's decision that "state action" does not constitute a triable issue of fact in the case at bar, in spite of the clear demonstration by *Martin* that the issue is live and factual, *Martin* establishes that defendants' constitutional position in this action was at least colorable, legitimate and bona fide. To punish a party for litigating its rights under the constitution, where such claim of rights is colorable and is made in good faith, by allowing attorneys' fees to be awarded against that party, would undermine the supremacy of the U.S. Constitution and would seriously chill the protection of constitutional rights via federal litigation. *See also*, 42 U.S. Code section 1988 and its legislative history.

III. THERE IS NO BASIS FOR THE SCURRILOUS AND CALCULATEDLY MISLEADING ACCUSATION THAT DEFENDANTS HAVE ACTED IN CONTEMPT OF THE INJUNCTIVE ORDERS IN THIS ACTION, AND THE ISSUE IS SEPARATE FROM THE AWARDABILITY OF FEES FOR WILLFUL INFRINGEMENT.

Seeking to try defendants' characters or conduct in this case by innuendo, rather than trying the legal and factual issues by rules, USOC accuses defendants of "willful misconduct", of a "direct violation of this Court's preliminary injunction" and of a "contemptuous...act", (Pl.Memo.Supp. Mo.Atty.Fees 12-13). These accusations are "based" by USOC on a patchwork of irrelevant, misleading and calculatedly distorted materials, as follows:

1.) The copy of the cover of SFA&A's newsletter that was provided by USOC to defendants' counsel, and presumably the copy that was provided to this Court, eliminates the third set of colored circles, thus creating an arguable resemblance to USOC's 5-ring symbol, whereas the original issues of this newsletter bear no such arguable resemblance. (Dec.T. Waddell Opp.Mo.Atty.Fees para. 1 and Exhibit A thereof).
2.) The use of the term "Olympic" in the announcement of the Lesbian/Gay Winter Games in Minneapolis/St. Paul does not constitute a violation of any injunctive order in this case, in that defendants' publication of the announcement was nothing but reporting on developments as to an event in which defendants and others enjoined in this action have and had *no* part; it is the group in Minneapolis/St. Paul, and not any of defendants or their associates, that has elected to call its activity the "First Lesbian/Gay Winter Olympic Games of 1986". (Dec.T. Waddell Opp.Mo.Atty.Fees para.2). Defendants submit that their non-promotional reporting of those developments as to the Minneapolis group violates neither the letter nor the spirit of the injunctive orders in this case, and is fully protected by the First Amendment's guarantee of freedom of speech.)
3) The photograph of the Gay Games torchbearers was published opposite a legend identifying the torchbearers as "Former Olypians [sic]". (See Exhibit A to Dec. Waddell Opp.Mo.Atty.Fees at pp.10-11) The copy of these pages provided to this Court by USOC obscures this fact. As set forth in the Declaration of Susan McGreivy, filed herewith, former Olympians such as Ms. McGreivy, whether they be gay or nongay, are fully entitled to wear their uniforms where, when and how they please. (Dec. S.McGreivy Opp.Mo.Atty.Fees, filed herewith). The labelling of Ms. McGreivy's wearing of her Olympic garments as a "contemptuous. . . act" is an insult to Ms. McGreivy, to the law and to the truth of the situation.

USOC has made no motion for an order to find defendants in contempt of any injunctive order in this action. Such a motion would afford *due process* to defendants—they would receive notice of the charges against them and an opportunity to be heard and to rebut those charges. USOC apparently chooses not to operate under relevant law governing contempt, instead sliding its groundless and confusing allegations of contempt in its moving papers here, to buoy its unsupported claim for attorneys' fees. In doing so, presumably USOC seeks to confound the Court with its assertion of "willful misconduct" by defendants, "based" on actions occurring *after* the purported trademark infringement in this case was enjoined. USOC's argument also ignores overwhelming record evidence of massive, extraordinary and successful efforts by those enjoined to comply immediately and fully with the injunctive orders issued on the eve of the first Gay Games. (Dec.'s T. Waddell, M. Brown, M. Evans, E. Petersen, H. Thatcher and B. Young Opp.Mo-.Prelim.Inj. (8/16/82)).

Attorneys' fees *may* be awarded to a party prevailing upon a motion for an order finding a trademark infringer to have acted in contempt of an injunction. *W.E. Bassett v. Revlon Inc.*, 435 F.2d 656, 665 (2d Cir. 1970). Such an award of attorneys' fees is distinguished from an award in an "exceptional case" under 15 U.S. Code section 1117, in that an award for contempt follows logically from the seriousness of the contempt and the implicit, necessary willfulness of a contempt. By labelling post-injunction actions of defendants at bar "contemptuous", without an opportunity for notice and hearing of the merits of USOC's claim as to contempt, USOC seeks to encourage this Court to disregard legal standards and the requirement of due process in favor of a prejudicial, unwarranted labelling of defendants' conduct, and to confuse the bases and standards for an attorneys' fee award for willful infringement under 1117 with an attorneys' fee award upon a properly based and litigated claim of contempt. If USOC has actual evidence of a contempt of any of the injunctive orders in this action by defendants, let it make its motion under the law and procedures governing claims of contempt, so that defendants may have proper notice and hearing of the claim and of their rebuttal to it. USOC's counsel's use of alleged post-injunctive developments in distorted, misleading ways to whip up ill will towards defendants and to create a prejudicial and jaundiced perspective upon defendants' motivations and good faith is scurrilous, improper and cannot *properly* aid USOC in its effort to have attorneys' fees for its litigation about events and actions occurring *prior* to issuance of the t.r.o. in this action.

IV. THE MOTION OF USOC DOES NOT CONFORM TO LOCAL RULE 270 AND DOES NOT PROVIDE A PROPER FOUNDATION FOR AN AWARD OF OVER $96,000.

Local Rule 270-1 requires the parties to a dispute as to attorneys' fees to "meet and confer for the purpose of resolving all disputed issues relating to attorneys' fees before making application." Plaintiffs did not even seek to have such a meeting at bar. Local Rule 270-1 allows for extensions of time for filing for good cause; USOC never sought any such extension in order to fulfill the meeting requirements or any other requirement of Rule 270. Local Rule 270-2 requires the movant to file certain declarations in support of a motion for attorneys' fees—these have not been filed at bar. No declarations conforming with Local Rule 270-2(a) have been filed. The declarations of USOC's counsel as to time and services fail to conform to the specific requirements of Local Rule 270-2(b) and (c) in that they omit information as to how the attorney time was spent, the manner of maintenance of time records and the relevant qualifications and experience of counsel, as well as statements of customary charges or prevailing rates. To grant this motion in spite of USOC's counsel's almost total abrogation of their duties to the Court and counsel for defendants under Local Rule 270 will represent a failure to apply relevant binding law to plaintiffs in deciding their motion. To grant this motion despite USOC's blatant nonconformance with the requirements of Local Rule 270 also will operate to seriously prejudice defendants, who, because of plaintiffs' counsel's disregard for Local Rule 270, have been deprived of the opportunity timely within the rule to resolve all disputes as to fees without judicial intervention and have been deprived of the opportunity afforded by the declarations specifically required by the rule to specifically and factually challenge, disprove, argue about and rebut plaintiffs' claim of over nine hundred (900) hours of attorney time in this case, at the rate of one hundred dollars ($100.) per hour, allegedly expended and necessitated in this litigation. The departure of USOC from the requirements of Local Rule 270 is both major and seriously damaging to defendants, if this Court finds a basis for any award of fees, and the nonconformance of USOC's papers and making of this motion with Local Rule 270 should warrant outright denial of the motion.

Defendants contend that USOC's moving papers do not provide sufficient information as to the hours expended nor as to the evaluation of the attorney time claimed. No showing of the necessity for three (3) sets of attorneys in three (3) cities to work on this case has been made. *Cf. John B. Stetson v. Stephen L. Stetson Co.*, 58 F.Supp 586, 594 (S.D.N.Y. 1944) ("...I am not convinced that it was necessary for two sets of counsel in two cities to devote the extensive amount of time testified to here to a motion...if the imposition of legal expenses is not to be punitive, the award for such expense must be governed more by what was necessary and reasonable than what was actually paid.") (*contempt* action as to an injunction for trademark infringement). No justification for the hundreds of hours claimed at bar has been offered. The record is wholly inadequate to support the award sought. *Cf. Foxtrap Inc. v. Foxtrap Inc.* cited *supra*, 671 F.2d at 641-2 (record inadequate to support $75,000. damage award); *Boston Professional Hockey Association Inc. v. Dallas Cap & Emblem Mfg. Inc.*, 597 F.2d 71, 73-77 (5th Cir, 1979) (record inadequate to determine whether defendant was a willful trademark infringer, to justify damage award of $66,000.). The amount of fees requested in the instant case is, in any event, totally disproportionate to the efforts required of plaintiffs' counsel in this litigation. *Compare, Playboy Enterprises Inc. v. Chuckleberry Publishing Inc.*, 687 F.2d 563, 564-5 (2d Cir. 1982) ($5000. attorneys' fees were granted after hearing on injunction and trial in trademark infringement case); *VIP Foods Inc. v. Vulcan Pet Inc.*, 675 F.2d at 1106, 1107, cited *supra* (Court of Appeals reversed award of $18,535. in attorneys' fees). Therefore, even assuming *arguendo* that there were proper legal, factual and equitable bases for an award of attorneys' fees to USOC (all of which are missing in the case at bar), the record does not warrant an award of $96,000+; such an award would be issued in contravention of relevant cases, standards for reasonable attorneys' fees and the provisions of Local Rule 270.

Dated: 10 May 1984

Respectfully submitted,
By: Mary C. Dunlap (Signed)
Attorney for Defendants

(Certificate of service omitted)

File Date: May 10, 1984

(Names & caption omitted in printing, see J.A. 62, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Susan D. McGreivy, Esq. in Opposition to Motion for Award of Attorneys' Fees

I, SUSAN D. McGREIVY, declare:

I am the supervising attorney of the National ACLU Lesbian and Gay Rights Project.

The plaintiff IOC has filed a picture of me lighting the torch of the Gay Games in San Francisco in the summer of 1982, and stated that because I was wearing the sweatsuit issued to me by the United States Olympic Committee as a member of the 1956 United States Olympic Team, the defendants willfully violated the provisions of this Court's order requiring the defendants to cease and desist from using the term "Olympics" or the Olympic five-ring symbol in relationship to the San Francisco Gay Games.

At all relevant times defendants were advised that they should comply completely with the terms of this Court's order and they did so do at considerable expense by removing the term "Olympics" from its documents, billboards, etc.

However, defendants believe this Court's ruling has serious First, Fifth and Fourteenth Amendment and other civil liberties implications which defendants Memorandum of Points and Authorities in opposition to Request for Attorneys Fees forcefully illustrate. This Court's order was therefore appealed.

With respect to my wearing my own sweatshirt: Suffice it to say I am an Olympian. I participated in the 1956 Olympics in Melbourne, Australia as a 400M freestyle swimmer. In connection therewith, I was given the sweatshirt. At no time was it ever told to me nor even intimated that I could not wear it whenever I wanted to at a place I had the right to be. I doubt such restriction would ever be given or that if it were it would be valid. At the time I wore it when I attended the Gay Games, I believed the First Amendment gave me an absolute right to call myself an Olympian. I believed I had an absolute right to wear the Olympic Uniform I was issued in Melbourne, Australia, at the time of the Gay Games or at any time I desired, contrary to the contentions of plaintiffs. I wore my Olympic Uniform at the opening ceremonies of the Gay Games because I was proud of that uniform and proud of my status as an Olympian. I was asked and agreed to undertake the duty of lighting the torch of the Gay Games because I believed it was an appropriate roll for an ex-Olympian to perform. I wore my officially issued Olympic sweatsuit because I believed it important for youthful members of the Gay and Lesbian community to see that among their numbers there are individuals who competed in the Olympic Games who are not afraid to say they are gay. I believed that my status as a role model would be of greater value by virtue of the act of wearing *my* Olympic uniform.

I state from my heart that as an American citizen it never occurred to me that day in San Francisco that I could not call myself an Olympian or wear my Olympic uniform which I got the old fashioned way—"I earned it!" It never occured to me that such activity was subject to a total application of censorship or perhaps more aptly in this case obliteration. It particularly never occurred to me that my act was in contempt of court.

(Jurat omitted.)

File Date: May 10, 1984

(Names & caption omitted in printing, see J.A. 62, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Thomas F. Waddell in Opposition to Motion for Award of Attorneys' Fees

I. THOMAS F. WADDELL, hereby declare under penalty of perjury:

1. I am a named defendant in the above-captioned action. I am informed and believe that USOC has excerpted and copied parts of the newsletter concerning Gay Games I published by San Francisco Arts & Athletics Inc. (SFA&A), in its moving papers in support of an award of attorneys' fees. Attached hereto is a true and correct copy of the issue of the newsletter that USOC has excerpted, marked "Exhibit A" of this Declaration; it is incorporated herein by this reference.

2. The item on page six (6) of the newsletter that is "Exhibit A" hereof concerning the "First Lesbian/Gay Winter Olympic Games" in Minneapolis/St. Paul was published as a news report item in "Exhibit A", with the intent solely to report as to the existence, location and plans of the organization, not to promote, publicize nor advertise the event. Neither I myself nor any other employee, officer or agent of San Francisco Arts & Athletics Inc. is or has been an employee, officer or agent of the Minneapolis/St. Paul group referred to in the article. The term "Olympic" appearing in the article was selected by the persons organizing the Lesbian/Gay Winter Games; that term was not selected by me nor by any other agent of SFA&A to identify that event.

3. Police continue to stage and publicize an annual "Olympics", with knowledge and tacit approval of USOC.

Upon information and belief, police and their "Olympics" have not been sued by USOC for the purported trademark infringement accomplished by police use of "Olympic" in conjunction with their games. A true and correct copy of the brochure cover and application form for the "1984 California Police Olympics" is attached to this Declaration, marked "Exhibit B" hereof, and it is incorporated by this reference.

4. Immediately upon issuance of the temporary restraining order in this action, I engaged in, and I required and assisted all other persons associated with SFA&A to engage in, exhaustive actions to comply with said t.r.o. These actions are described in detail in the Declarations of myself and others in opposition to the motion for preliminary injunction in this action (Declarations filed 8/16/82)). Upon issuance of the preliminary injunction and of the permanent injunction in this action, I and all others associated with SFA&A have acted and continue to act carefully and attentively to comply with and obey the letter and spirit of those injunctive orders.

Dated: 10 May 1984

Thomas F. Waddell (Signed)

(Exhibits omitted.)
(Exhibits are in Record, Docket #106.)

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reply Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

There is no question that before filing this motion plaintiffs' counsel failed to comply with L.R. 270. That oversight is keenly embarrassing to counsel but did not, however, prejudice defendants. Their counsel declined an invitation to meet, confer and exchange the information called for by L.R. 270 on the ground that plaintiffs are not entitled to attorneys' fees as a matter of law (Walker Decl., May 16, 1984, p. 1). Nothing which plaintiffs could have provided in advance of the Court's determination that an award of fees is appropriate would have changed that position, defendants' counsel stated (id.). Compliance with L.R. 270 would not, thus, have altered the issue presented to the Court. With this reply, plaintiffs have submitted supplemental declarations in accordance with those comtemplated by L.R. 270 and remain willing to meet and confer with defendants' counsel. We submit that plaintiffs should not be penalized for the lapse of their attorneys.

I. REASONABLE ATTORNEYS' FEES ARE RECOVERABLE AT THE DISCRETION OF THE COURT.

Plaintiffs demonstrated in their opening memorandum that the legislative history of the Amateur Sports Act reveals Congress' intent to permit an award of attorneys' fees at the discretion of the court; a showing of the defendant's willfulness is not required. Defendants erroneously argue that because the Act incorporates the "remedies" of the Lanham Act, it must incorporate the Lanham Act's standard for attorneys' fees awards. The legislative history, however, is to the contrary. It shows that the Act's reference to "remedies" was simply a shorthand way of listing the types of relief available, not an incorporation of a different standard from what had been in the Act all along.

This Court observed in granting summary judgment that the Amateur Sports Act "incorporates only the remedies of the Trademark Act and nothing in the language or the legislative history of section 380 [of the Amateur Sports Act] indicates that the Trademark Act's defenses were to be incorporated as well" (Rptr.Tr.Hrg., Feb. 2, 1984, p. 19). Plaintiffs' entitlement to recovery of attorneys' fees is, thus, created by the Amateur Sports Act, not the Lanham Act.

The latter's requirement of willfulness is not a precondition for a fee award here.

There are obvious reasons for having a stricter standard for awarding attorneys' fees under the Lanham Act. Common trademark law is necessarily uncertain, involving claims and defenses that are often difficult to predict. Consequently, there is a logical basis for conditioning an award of attorneys' fees on a showing of willfulness. By contrast, the Amateur Sports Act specifies precisely what terminology and designations are protected and expressly lists the prohibited uses. Under these circumstances, it is appropriate to award attorneys' fees under a lesser showing.

Defendants' discussion of the *Union Sport Apparel* case does not help them. The fact that willfulness was present in that case does not mean that fees cannot be awarded under a lesser standard.

II. IN ANY EVENT, DEFENDANTS WILLFULLY VIOLATED THE AMATEUR SPORTS ACT.

Even if willfulness is the test, defendants' conduct warrants an award of attorneys' fees. In our opening memorandum, we set forth the abundant evidence of defendants' willfullness. In their opposition, defendants claim no willfulness was involved, but even their version of events tends to confirm plaintiffs' showing.

There can be no dispute that defendants knew from the outset that their use of Olympic designations was prohibited by the Amateur Sports Act. Defendants themselves do not dispute this; instead, they argue that they were advised by their attorney that the plaintiffs' position was "constitutionally flawed" (Def.Mem., p. 6). This argument simply confirms that defendants' use of Olympic designations was intentional and that they knew it was in violation of the Amateur Sports Act. Defendants hoped—erroneously, as it turned out—that the statute would be held unconstitutional. But this hope makes the violation of the Act no less willlful. One who violates a statute on the mistaken advice of counsel that the act is unconstitutional has committed no less a willful law violation because of a desire to precipitate a so-called "test case" than any other willful violator. In *La Raza Unida of Southern Alameda County* v. *Volpe* (N.D.Cal. 1977) 440 F. Supp. 904, defendants challenged the constitutionality of the attorneys' fees provision of the Civil Rights Act (42 U.S.C. § 1988) on the ground that it violated the Eleventh Amendment. Chief Judge Peckham rejected the argument that such a challenge made an award inappropriate and ordered that fees be paid (id., p. 913). The fact that defendants' challenge was purportedly constitutional proved immaterial, and should here as well.

There can be no doubt that defendants used Olympic designations to lend prestige and credibility to their event. Defendants now claim that they did not intend to create confusion, did not intend to create a connection with the USOC, and indeed sought less emphasis on competitiveness (Def.Mem., pp. 5-7). But the issue is whether they willfully used Olympic designations to promote their event, and on that question the evidence conclusively shows that they did.

Defendants' argument that their nonprofit status should insulate them from an award of attorneys' fees (Def.Mem.,p. 7) is similarly misconceived. A nonprofit organization is equally capable of willful statutory violations as a profit-making organization. The absence of a profit motive hardly negates the possibility of willfulness.

Defendants also argue that an award is not permissible because plaintiffs have failed to prove any monetary damage caused to them by defendants' infringement (Def.Mem., p.9). This purported standard goes beyond even defendants' own proffered test for a fee award. Plaintiffs have properly obtained an injunction to vindicate their rights under the Amateur Sports Act, and they have had to expend attorneys' fees to do so. They do not seek additional monetary damages in this motion; they seek the reasonable fees expended in securing their rights.

Defendants' contention that plaintiffs have not submitted sufficient evidence to show defendants' willfulness by an admission (Def.Mem.,p.10) misses the point. The undisputed evidence of defendants' own actions is sufficient on the willfulness issue. Defendants knew their use of Olympic designations was in violation of the Act from the outset, but they went ahead and used them anyway. Therefore, an award is appropriate even under the willfulness test.

III. DEFENDANTS' PURPORTED "EQUITABLE CONSIDERATIONS" ARE MERELY EFFORTS TO REARGUE THE MERITS.

As claimed "equitable considerations" that should preclude a fee award, defendants simply rehash their arguments on the merits that have been rejected time and time again (Def. Mem., pp. 11-13). They again claim that their use of Olympic designations was constitutionally protected, that their use is protected because the term is generic, and that they are the victims of unlawful discrimination in this infringement action. These arguments were rejected by Judge Conti at the hearing on the temporary restraining order, by Judge Peckham at the preliminary injunction stage, by the Ninth Circuit on the appeal of the preliminary injunction, and by this Court on plaintiffs' summary judgment motion. The act of proffering unsuccessful defenses should not insulate a willful infringer from a fee award.

Defendants mischaracterize plaintiffs' motion as a punitive one. Plaintiffs are not seeking anything more than their reasonable fees expended in this litigation. The effect of an award would be to strengthen USOC's hand in dealing with misusers and to deter unauthorized uses by other infringers. These are plainly the goals of the Amateur Sports Act, and they would be advanced by an award here.

Defendants also attempt to reargue the "state action" issue, citing *Martin* v. *IOC* (C.D.Cal. April 16, 1984; a copy of the opinion is attached hereto as Exhibit A) (Def.Mem., pp. 13-14). This argument is totally irrelevant to this motion; defendants' proper forum is the Ninth Circuit. In any event, *Martin* held that the conduct of the Los Angeles Olympic Organizing Committe, not USOC, constituted "state action"

(Slip Op. at 20).[1] The LAOOC, of course, is not involved in the instant action. Moreover, even if state action were present there, the Ninth Circuit has previously ruled that the form of "speech" engaged in by defendants is not protected by the Constitution.

Nor is there merit to defendants' argument that a fee award would punish them for litigating constitutional issues. Defendants did not elect to seek declaratory relief; they chose to infringe and interpose constitutional defenses that were rejected on four different occasions. But one who violates a statute on the mistaken belief that it is unconstiututional suffers the consequences no less than one whose defense is more mundane (see, e.g., *N.L.R.B.* v. *Joint Council of Teamsters No. 38* (9 Cir. 1964) 338 F. 2d 23, 31-32). The mere assertion of such defenses should not preclude an award; otherwise willful infringers will simply invoke this irrelevant loophole and escape liability.

IV. DEFENDANTS' CONDUCT DEMONSTRATES THE NEED TO STRENGTHEN PLAINTIFFS' ABILITY TO ENFORCE THEIR RIGHTS.

Defendants' newsletter promoting the "Gay Winter Olympic Games" and Ms. McGreivy's use of the official Olympic uniform underscore the need for strengthening plaintiffs' enforcement powers. These incidents show at the very least that further efforts to trade on unauthorized uses of Olympic designations are likely; at most they show that defendants themselves have acted in violation of this Court's orders.

The announcement of the "Gay Winter Olympic Games" is particularly troublesome. Defendants argue that this announcement is protected by some "reporting" privilege, because the name was thought up by someone other than defendants. It seems evident, however, that defendants are promoting this event in their newsletter—an act that is in violation of the injunction.[2] In any event, plaintiffs are not initiating contempt proceedings with this motion. Instead, we are bringing these events to the Court's attention to show that infringement of Olympic designations is constantly recurring, and a fee award is necessary to permit plaintiffs to vindicate their legal rights without undue expense to the Olympic activities they fund.

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[1] As seen from the opinion, the conduct of the USOC in that case was held to be subject to constitutional restraints only because of its agency relationship with the LAOOC, a relationship not present here. The plaintiffs in *Martin* were, in any event, unsuccessful on their motion for a preliminary injunction. Accordingly, the state action holding of *Martin* may be considered dicta.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening memorandum, plaintiffs' motion for an award of attorneys' fees should be granted.

Dated: May 17, 1984.

(Names omitted. See J.A. 5, above.)

By: Robert A Gordon, (Signed)
Attorneys for Plaintiffs
International Olympic Committee
and United States Olympic Committee

(Exhibit omitted. Exhibit is in Record,
Docket #107.)

(Certificate of service omitted.)

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[2] Similarly, Ms. McGreivy's wearing of the official Olympic uniform, while perhaps involving some personal expression and use, was also done to promote the Gay Games event.

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Vaughn R. Walker in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

I, *VAUGHN R. WALKER*, declare:

1. I am a partner in Pillsbury, Madison & Sutro, plaintiffs' counsel herein, and make this declaration in support of Plaintiffs' Motion for Attorneys' Fees. I have personal knowledge of the matters referred to hereinafter and if called as a witness could testify competently thereto.

2. On May 10, 1984, I received defendants' papers in opposition to plaintiffs' attorneys' fees motion herein. Before that neither I nor my partner Robert A, Gordon, Jr., were aware that plaintiffs' motion had failed to comply with Local Rule 270. Shortly after reviewing defendants' papers, I telephoned Mary Dunlap, defendants' counsel, apologized for our error and offered to meet with her at a time and place of her convenience to discuss the motion and provide the information called for in L.R. 270. Ms. Dunlap declined this invitation. She stated that she had been entitled to a meeting before the motion was filed and, in any event, was not prepared to compromise her position that plaintiffs are not entitled to an award of attorneys' fees whether L.R. 270 was complied with or not. There was no information that we could provide that would change her position so a meeting would be futile, Ms. Dunlap stated. She also stated that I could represent her position to the Court.

3. In addition to myself, three other lawyers at Pillsbury, Madison & Sutro provided substantive services in connection with the above case: (a) *Noble K. Gregory*, then the

firm's senior appellate lawyer, argued the appeal of the preliminary injunction entered by this Court in the United States Court of Appeals for the Ninth Circuit and reviewed and revised the briefs filed in connection with that appeal. Mr. Gregory also advised and consulted with me in connection with defendants' application to the Ninth Circuit for a stay of the preliminary injunction. (b) *Robert A. Gordon, Jr.*, performed research and prepared briefs, memoranda of points and authorities and correspondence and other tasks at all phases of the litigation following the entry of this Court's temporary restraining order on August 9, 1982. Prior to entry of the temporary restraining order, (c) *Denise Amantea* assisted me in research and preparation of evidentiary materials in connection with the application for a temporary restraining order; due to illness, Ms. Amantea was not further involved in the case. (d) My services consisted of all court appearances in this Court, research, preparation of briefs, legal memoranda, points and authorities, declarations, correspondence and consultation with both the United States Olympic Committee and the International Olympic Committee through its United States Counsel. In addition, (e) *Charles B. Renfrew* and (f) *John B. Bates* consulted trademark counsel for the United States Olympic Committee at the outset of my firm's engagement in this litigation but did not perform further substantive services.

4. The attorneys in my firm regularly maintain a daily time record of the time devoted to various matters. These records specify the identity of the client for whom services are performed, the general subject classification of the work and a brief description of the work actually performed. These time records are maintained in quarter-hour segments and are compiled on a monthly or quarterly basis for use in connection with preparation of billings to clients. The services performed by the various lawyers working on this case were compiled by the firm's business office. For purposes of billing, an internal accounting charge for each lawyer is applied to the time devoted to a particular matter.

These internal time charges reflect the attorney's experience, type of practice, and the firm's costs of operation. These internal charges, which are maintained by my firm as confidential and private matters, are used as a base of information to determine an appropriate fee to be charged to the client for services. That fee, however, generally reflects a variety of other factors peculiar to the work performed. These factors include the outcome of the particular case or proceeding, the efficiency with which work was performed, the difficulty of the matter, the ability of the client to pay and a wide variety of other factors deemed appropriate by the billing partner. During the period of time that they were active in this litigation, the internal accounting charge for Messrs. Bates, Renfrew and Gregory was $180 per hour and for Ms. Amantea was $75 per hour. Mr. Gordon's internal time charge was $100 per hour until July 31, 1983 when it became $120; on January 1, 1984, Mr. Gordon's hourly charge was revised to $135. My internal charge was $140 per hour until July 31, 1983, when it became $150 and then $160 on January 1, 1984.

5. I am the billing partner in my firm for the United States Olympic Committee and the International Olympic Committee. In determining the fees charged, I used the foregoing internal time charges only as a guide. Because the United States Olympic Committee and the International Olympic Committee are nonprofit, public service organizations, all bills rendered by my firm for services performed were at two-thirds or less of the internal hourly charges. This ratio was selected as roughly the amount necessary to cover the firm's costs associated with these services. Accordingly, my firm's services were performed on this matter at essentially a non-profit basis. The amount of the fees sought by my firm with this motion was actually billed to these clients.

6. The qualifications of the lawyers who devoted time to this case are as follows: (a) *Mr. Renfrew* was educated at Princeton University (A.B. 1952) and the University of Michigan (J.D. 1957); he was admitted to the State Bar of

California in 1956 and practiced at Pillsbury, Madison & Sutro as an associate from the year of his admission until 1965, when he was elected a partner. Mr. Renfrew left the firm in 1972 to become a United States District Judge for the Northern District of California, leaving that position in 1979 to become Deputy Attorney General of the United States. He returned to the firm in 1981 and practiced with the firm until 1983. (b) *Mr. Gregory* was educated at the University of California, Los Angeles (A.B. 1939) and Boalt Hall School of Law, University of California (LL.B 1946). He was admitted to practice in California in 1946 and served as law clerk to the Honorable Roger J. Traynor, then a Justice of the California Supreme Court, before coming to the firm in 1948. Mr. Gregory was elected a partner in 1956 and specialized in public utility and regulatory matters, trial work and later in appellate work until his death in 1983. (c) *Mr. Bates* was educated at Stanford University (A.B. 1940) and attended law school at Stanford and the University of California, Boalt Hall (LL.B. 1947). He joined Pillsbury, Madison & Sutro in 1947 as an associate and became a partner in 1953. His work was primarily in the trial of cases, and he is a fellow of the American College of Trial lawyers. At the time of his work on the present case, he was the firm's managing partner. (d) *I* was educated at the University of Michigan (A.B. 1966), did post-graduate work in economics at the University of California at Berkeley and attended law school at the University of Chicago and Stanford University (J.D. 1970). Following law school, I subsequently served as law clerk to the Honorable Robert J, Kelleher, United States District Judge for the Central District of California. Following admission to the State Bar, I became an associate at Pillsbury, Madison & Sutro in 1972 and a partner in 1978, devoting the bulk of practice to business litigation and governmental matters. (e) *Mr. Gordon* was educated at Yale University (B.A. 1973), and the University of Virginia Law School (J.D. 1976) where he served as Notes Editor of the University of Virginia Law Review. He was admitted to practice in California in 1976 and until 1977 was law clerk to the Honorable James R. Browning, Chief Judge of the United States Court of Appeals for the Ninth Circuit. In 1977, he became an associate of Pillsbury, Madison & Sutro and was elected a partner in 1984, devoting a substantial portion of his practice to litigation involving securities matters and pension plans. (f) *Ms. Amantea* was educated at the University of California at San Diego (B.A. 1975; M.A. 1976). graduating magna cum laude, and the University of Southern California (J.D. 1979) where she was Associate Editor of the law review. She was admitted to practice in 1980. Ms. Amantea served as research attorney to the Honorable William Newsom, Justice of the California Court of Appeal, during 1980 before coming to Pillsbury, Madison & Sutro where she has been an associate since 1981, practicing in the area of general litigation.

(Jurat omitted)

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Supplemental Declaration of Edward T. Colbert in Support of Plaintiff's Motion for an Award of Attorneys' Fees

EDWARD T. COLBERT declares as follows:

1. I am a member of the firm of Beveridge, DeGrandi & Kline, attorneys for plaintiffs in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Beveridge, DeGrandi & Kline acts as general counsel to plaintiff United States Olympic Committee ("U.S. Olympic

Committee"). Since this litigation began in August 1982, several attorneys of this firm have provided legal services in connection with this action, in excess of 400 hours. The specific projects and the attorneys assigned thereto are shown in detail on the attached schedules I through VIII. Beveridge, DeGrandi & Kline has actually billed its clients for this work.

3. In addition to the actual hours shown in schedules I through VIII, the U.S. Olympic Committee was charged for actual disbursements plus service charges, as well as incidental clerical expenses including, *inter alia*, messengers, word processing, telephone, duplication and travel expenses in an amount in excess of $6,300.

4. The qualificationsof Messrs. Richard G. Kline, Edward T. Colbert and Joseph D. Lewis are shown generally in the attached excerpts from the Martindale-Hubbell Legal Directory. In addition, the firm of Beveridge, DeGrandi & Kline has developed particular expertise in the area of sports and sports organizations and litigation in matters related thereto, as a result of long representation of the U.S. Olympic Committee and the Amateur Athletic Union of the United States, prior to becoming general counsel to the U.S. Olympic Committee.

5. The reasonable and normal hourly fees charged by the attorneys of Beveridge, DeGrandi & Kline in this action, are the same as are charged in all matters upon which those individuals work. They are, at various times:

Richard G. Kline	July-Oct. 1982	$150 per hour
	Nov. 1982-Aug. 1983	$160 per hour
	Sept. 1983-Present	$160 per hour
Edward T. Colbert	July-Oct. 1982	$100 per hour
	Nov. 1982-Aug. 1983	$105 per hour
	Sept. 1983-Present	$125 per hour
Joseph D. Lewis	July-Oct. 1982	$ 75 per hour
	Nov. 1982-Aug. 1983	$ 80 per hour
	Sept. 1983-Present	$ 90 per hour

6. Time records are kept on a daily basis, in increments of tenths of an hour, and must reflect the actual time worked,

not an estimate of value for the services rendered. That data is entered in electronic data processing equipment and printed copies of all data are maintained. The calculations of dollar value by projects and attorney are taken directly from the existing business records of Beveridge, DeGrandi & Kline and reflect a simple calculation of hours times the regular billing rate of each attorney.

7. The attorneys of Beveridge, DeGrandi & Kline, acting as general counsel to the U.S. Olympic Committee, undertook to assure that there was no duplication of effort between themselves and co-counsel, or themselves and local counsel, as may be seen by a comparison of the hours expended, and the areas in which expended, among the several firms which have submitted declarations in support of a motion for attorneys fees. It was important that the firm of Beveridge, DeGrandi & Kline, having ease of access to the clients as well as particular expertise in this area, participate actively with local counsel, more familiar with trial practice in this court. As a result, counsel for plaintiffs were able to divide the labor in a fashion to maximize efficiency, and consulted frequently to assure lack of duplication.

(Jurat omitted.)
(Exhibits other than accounting omitted.
Exhibits are in Record, Docket #110).

I.

Preparation and filing of complaint and answers to counterclaims, including consultation with client, consultation and coordination with co-plaintiffs' counsel, retention of and instructions to local counsel, and legal research on issues:

	Hours	**Service Charge**
Richard G. Kline	45.2	4,347.50
Edward T. Colbert	14.6	1,460.00
Joseph D. Lewis	13.3	997.50
Richard Gresalfi	35.5	1,420.00

II

Preparation for temporary restraining order hearing, including memoranda, declaration, exhibits and legal research, as well as attendance at and participation in such hearing:

	Hours	**Service Charge**
Richard G. Kline	36.4	5,460.00
Edward T. Colbert	22.4	2,240.00
Joseph D. Lewis	3.2	240.50

III

Preparation for preliminary injunction hearing, including memoranda, declaration, exhibits and legal research, as well as attendance at and participation in such hearing:

	Hours	**Service Charge**
Richard G. Kline	32.3	4,845.00
Edward T. Colbert	1.5	150.00
Joseph D. Lewis	25.0	1,875.00

IV.

Preparation for and response to motion to stay pending appeal:

	Hours	**Service Charge**
Richard G. Kline	7.5	1,125.00
Joseph D. Lewis	4.0	310.00

V.

Preparation for trial, including development of discovery, strategy, and selection and retention of consultants and witnesses, as well as responses to discovery requests by defendants:

	Hours	**Service Charge**
Richard G. Kline	5.8	5,231.00
Edward T. Colbert	48.6	5,103.00
Joseph D. Lewis	2.8	224.00

VI.

Preparation of brief on appeal, including legal research and response to petition for rehearing:

	Hours	Service Charge
Richard G. Kline	28.7	5,315.00
Edward T. Colbert	12.8	1,344.00
Joseph D. Lewis	18.9	1,512.00

VII.

Preparation of motion for summary judgment, including memorandum and declarations, as well as legal research:

	Hours	Service Charge
Richard G. Kline	14.2	2,272.00
Edward T. Colbert	3.7	462.00
Joseph D. Lewis	14.7	1,204.00

VIII.

Preparation of motion for attorney fees:

	Hours	Service Charge
Richard G. Kline	4.0	640.00
Edward T. Colbert	2.4	300.00
Joseph D. Lewis	8.2	738.00

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Supplemental Declaration of John I. Huhs in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

I, John I. Huhs declare as follows:

1. I am a member of Pisar & Huhs, attorneys for plaintiff

International Olympic Committee in this action. I have personal knowledge of the matters referred to hereinafter and if called as a witness could testify competently thereto.

2. I performed most of the services devoted to this action by my firm; my partner Samuel Pisar also spent some time relative to this case. My firm has represented the International Olympic Committee since 1979. My partner and I maintain a daily diary of appointments and work broken down by quarter hours by client and work performed. Because of the nature of the services which we customarily perform for the International Olympic Committee we do not generally break out the individual matter on which work is performed. In connection with this case, we followed our customary practice. From the records of work performed for IOC it is possible to identify the number of hours devoted to the above action, and I have reviewed my daily diaries and the files and records of my firm pertaining to the above action and am able to state that my partner and I spent at least 89 hours of work on this case. These services included consultation, usually by international long distance telephone conversations with officials of the IOC regarding the IOC's participation in this lawsuit, consultations with co-counsel, review of pleadings and other documents, preparation and review of correspondence and files, travel to California and attendance at the Preliminary Injunction hearing on August 19, 1982.

3. With reference to my qualifications and experience, I am admitted to practice law in New York and the District of Columbia. I received a BA degree from the University of Washington in 1966 and MBA and JD degrees from Stanford University in 1970. While at law school I was comment editor of the Stanford Law Review. I have practiced law in New York at all times since 1971 with the exception of 1974-1976 when I was a staff member of the Office of Management and Budget, National Security and International Affairs Management Division serving at the White House during President Ford's administration. I am

the author of "Trade Preferences for Developing Countries: Options for Ordering International Economic and Political Relations," Stanford Law Review, 1968; "Developing Trade with the Soviet Union," Columbia Journal of World Business, 1983; "U.S. Boycott of Soviet Union; Legal and Administrative Framework," Boycott Law Bulletin, 1980. I am a member of the American and International Bar Associations, the District of Columbia Bar and the American Society of International Law. I serve as chairman of the Committee on Soviet and Eastern European Law, Section on International Law, the American Bar Association and from 1977 to 1982 was vice-chairman of the Committee on East-West Trade and Investment. My practice has almost exclusively been in the area of international law and transnational commercial relations. Until 1983 the customary hourly charge for services which I performed was $165 per hour. Since 1983 my customary hourly fee has been $175.

4. My partner Samuel Pisar was admitted to practice law in the District of Columbia, California, New York and a barrister at law in the United Kingdom and served as Conseil Juridique in the Republic of France. Mr. Pisar received his LL.B degree in 1953 from the University of Melbourne, a LL.M. in 1955 and S.J.D. in 1959 from Harvard Law School, and a Doctor of Law from the University of Paris in 1966. From 1961 to 1962 he served as an advisor to the Joint Economic Committee of Congress and in 1961 was a member of the President's Task Force on Foreign Economic Policy. In 1960 Mr. Pisar served as a consultant to the Committee on Foreign Commerce of the United States Senate. He authored "Coexistence and Commerce," McGraw-Hill, Inc. 1970; "Of Blood and Hope," Little, Brown and Company, 1980. Mr. Pisar speaks in addition to English, French, German and Russian. At all times during the course of this action his fee was $250 an hour.

(Jurat omitted.)

File Date: May 24, 1984

(Title omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reporter's Transcription of Proceedings
Motion for Attorneys Fees

Before: The Honorable John P. Vukasin, Jr., Judge

APPEARANCES:
FOR THE PLAINTIFFS:
VAUGHN R. WALKER, ESQUIRE
PILLSBURY, MADISON & SUTRO
225 BUSH STREET
MAILING ADDRESS: P.O. BOX 7880
SAN FRANCISCO, CA 94120

FOR THE DEFENDANTS:
MARY C. DUNLAP, ESQUIRE
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SAN FRANCISCO, CA 94112

COURT REPORTER:
RAYMOND LINKERMAN
450 GOLDEN GATE AVENUE
BOX 36052
SAN FRANCISCO, CA 94102

The Clerk: Calling Civil Matter C-82-4183, International Olympic Committee versus San Francisco Arts & Athletics. Counsel, please step forward and state your appearances.

Mr. Walker: Good Morning, Your Honor, I'm Vaughn Walker, V-a-u-g-h-n, W-a-l-k-e-r, for plaintiffs. And with me is Ronald Rowan, General Counsel of the United States Olympic Committee.

The Court: Thank you.

Ms. Dunlap: Mary Dunlap for the defendants. Good morning, your Honor. Dr. Thomas Waddell, who is one of the main defendants, is with me this morning.

The Court: Thank you.

All right. The background of this case is that the United States Olympic Committee was granted exclusive use of the word "Olympics," along with any signs, emblems or words. This grant was embodied in what we call the Amateur Sports Act, 36 U.S. C. Section 371, and the following sections. The United States Olympic Committee was specifically granted the power to protect its rights under this Amateur Sports Act.

So far as these parties are concerned, these are the facts as I understand them: That the first contact between the USOC and the defendants occurred in December of 1981, when there was an exchange of correspondence. Apparently letters crossed in the mail. The USOC's letter requested defendants to cease using the USOC's trademark, while the defendants' letter requested permission to use the trademark.

Later, in January of 1982, I think it was, there was a telephone conversation between Colonel Miller of the Committee and the defendant in this case, Waddell, and the result of this telephone conversation was a letter from the defendant Waddell to Colonel Miller, indicating that the defendant would cease using the trademark. And then eight days later, the defendants the same defendant wrote to Miller indicating that the defendants intended to use the Olympic designation. And plaintiff responded in August of 1982 with the filing of this suit.

I think those — that's essentially the facts that led up to the litigation, the background of this, and I think — I cite it because — and relate it because I think it may have a bearing

***The Court** (cont.):* on the ruling.

When the suit was filed, a temporary restraining order was immediately granted, and then on August 20th, a preliminary injunction was granted, both of those in another court, prohibiting defendants from using the word "Olympic" in connection with the promotion of any of its athletic activities. That injunction was appealed, and the Ninth Circuit, in June of 1983, affirmed the grant of the preliminary injunction.

In February of this year, in this court, summary judgment was granted to the plaintiffs, and that order of this court is on appeal to the Ninth Circuit.

Now the plaintiff moves for attorneys' fees. They appear to be substantial, and is referred to in various places, but frankly, I have not found any particular place where it was totaled. Do you have a total anywhere in your papers?

Mr. Walker: Yes, your Honor, I believe it's $96,600.

The Court: Do you have a total in your papers?

Mr. Walker: I'm not sure whether I have a total in the memorandum or not. I —

The Court: Has anybody computed all the figures in your memorandum?

Mr. Walker: Yes. I computed it when I prepared a proposed order. And the total was, I'm sorry, $96,900.

The Court: Ninety-six thousand —

Mr. Walker: —900.

The Court: — Nine hundred dollars. Have you computed them Ms. Dunlap?

Ms. Dunlap: That appears to me to be the total that the plaintiffs request, your Honor, $96,900.

The Court: Ninety-six six or ninety-six nine?

Ms. Dunlap: My computation is ninety-six six, your honor, but since it's not my request, I would hesitate to insist upon my figure.

The Court: I am familiar with your arguments. I had one preliminary question in my mind, and that is, whether or not this motion might be premature in view of the fact that there is an appeal pending, but it might take a year in the Ninth

The Court: *(cont.):* Circuit, might go on to the Supreme Court, so I don't — I just started that — that thought rather quickly.

All right. I understand the remedies under the Amateur Sports Act available to the parties are the same available under the Trademark Act of 1946. That does include attorneys' fees, and does provide that courts may award reasonable attorneys' fees.

Let me state my understanding of your respective arguments and then maybe you can amplify it. The plaintiff argues that the reference to the Trademark Act is solely to indicate the nature of the remedies available, and to ascertain the standard to be used, we should look to the legislative history. And there's authority to the effect that the Senate proposed giving the Court complete discretion.

The defense argues that the Trademark Act remedies should necessarily embody the case law developed thereunder, and that while the case law — the standard in the case law for attorney's fees is that it's discretionary with the Court, certain factors are to be taken into account, and these factors are whether the acts of infringement can be characterized as malicious, fraudulent, deliberate or willful.

Would you like to take issue with my understanding of your position, Mr. Walker, or to amplify what I understand to be your position?

Mr. Walker: I do not wish to take issue with that understanding at all. I concur with it, your Honor. I would only amplify in one respect, and that is, we believe that the record here does make out a case of a willful violation of the Act, and the exceptional circumstances referred to in the Lanham Act are also...

The Court: Is that microphone on?

Mr. Walker: I believe it is. We believe that even if your Honor concludes that willfulness is a requirement for an award of attorneys' fees here, that the facts here establish a willful violation. In addition, the Lanham Act addresses the situation where attorneys' fees may be granted in what is

Mr. Walker: (cont.): described as exceptional cases. We believe this fits within that description.

The Court: Why?

Mr. Walker: For two reasons, your Honor. Number one, the violations here were undertaken despite the exchange of correspondence and communication which your Honor referred to at the outset. Clearly, the defendants knew of the USOC's position, its belief that the USOC was exclusively entitled to Olympic terminology and symbols, and to their use, and nonetheless, the defendants went ahead and put together games using Olympic symbols and terminology. But —

The Court: Which they referred to as the Gay Olympics; is that right?

Mr. Walker: That's correct. Their argument on willfulness, and their claimed lack of willfulness, comes down to the point that they say they used Olympic terminology and symbols solely to spark a test case.

The Court: Solely to what?

Mr. Walker: Spark a test case, because they wished to challenge the constitutionality of the USOC's proprietary right in these symbols and in these terminologies. But thereby, if they — if they won the test case, then they would have used the USOC's good will and the USOC's rights to that mark. But they lost the case. The constitutionality of the Act has been upheld at all stages, by Judge Conti, by Judge Peckham, and by two panels in the Ninth Circuit, and by your Honor when he granted summary judgment.

The Court: Okay. Thank you. Ms. Dunlap.

Ms. Dunlap: Thank you, your Honor. I'll take this opportunity primarily to respond to the reply brief of the defendants filed last week — plaintiffs, rather, filed last week.

Let me say at the outset that the Court's summary of the facts as to this exchange of letters over the winter and spring of 1982 could be summarized as Judge Peckham summarized it at page 5 of his order granting the preliminary injunction as

***Ms. Dunlap:** (cont.): follows:*

> "It is likely that each party was under the impression that it had forced its wishes upon the other and that each had achieved its respective goals."

That would seem to me to be hardly a finding of willfulness, and I point out in that regard that Judge Peckham in his opinion found no tendency intentionally to deceive or mislead or in some other way manipulate the public.

The plaintiffs in this case have made a number of arguments in their reply memorandum which must be addressed, because they were based on entirely false premises about what the defendants did in this case, and about what the defendants' intent can be inferred to be.

First of all, though, there's the little matter of local rule 270, with which the plaintiffs admit they did not comply. They argued to the Court that although they comply with the local rule, they didn't file the declarations required, they didn't request the meeting that the rule requires them to request, that because it was proposed to me after the motion was filed, and after the opposition was filed, that we might meet, and because I said I didn't see a purpose in such meeting, unless the Court required one of me, that we have not been prejudiced. Nothing could be more inaccurate.

In this case, the plaintiffs have filed declarations purporting to — to support ninety-six thousand some odd dollars in attorneys' fees, which are entirely inadequate declarations, devoid of detail, inaccurate in terms of presenting for defense counsels' challenge an accounting of hours; and finally, they're presented, not at the start of the action, at the phase where the motion is filed, but by way of reply. The idea that the defendants are not prejudiced by this late and inadequate and incomprehensible set of filings is entirely inappropriate.

Let me address the merits of the plaintiffs' motion. They have argued that the Amateur Sports Act incorporates the remedies under the Lanham Act, as the Court itself found in granting summary judgment in this case, but that position is entirely meaningless, if Congress did not also intend to

Ms. Dunlap: *(cont.):* incorporate the standards for relief under the Lanham Act, otherwise it would be no more necessary for the U. S. Olympic Committee to show a basis for relief than for it to file suit. That is to say, they could walk into court under their theory of the Amateur Sports Act, ask for an injunction, tell the Court that it need not look at any standards for equitable relief, that they were simply the U.S. Olympic Committee and were entitled to relief, and they would get their relief. I don't think that's what the Amateur Sports Act means, I don't think that's what Congress intended, and I don't think that's what any of the legislative history they cite supports.

Their position seems to be one of tossing equity and trademark law out the window in favor of advancing the U.S. Olympic Committee. Again, I don't think Congress intended anything of the sort.

It's interesting here that the plaintiffs take the position that this Court may find on the state of the record that these defendants intentionally violated the law in using the word "Olympic." It's interesting, because it contrasts poignantly with their position on summary judgment that the intent of the parties in this case was irrelevant, that this Court need not find facts on that point, that there were no triable issues and that the defendants were not entitled to a trial. On the very issue that they now stand before this Court and say that the record precludes the Court from finding other than willfulness, they argue in favor of no trial, that the question of willfulness, the question of deliberateness was one the Court need not resolve.

Let me say in this regard that if it is — if the test for attorneys' fees is the discretion of the Court, then the history of equity is that that discretion should not be defined by, as it was historically spoken, "the length of the Chancellor's foot," but rather by equitable considerations.

The equitable considerations to be taken into account in this case are the intent of the parties, the nature of the information provided to them, the state of the law at the time

***Ms. Dunlap**: (cont.):* that they acted, and the nature of the trademark itself. Here I think there was a vivid contrast between the word "Olympic," twenty-seven hundred years old, generic, descriptive, and in wide — worldwide usage, as the record establishes, and, for example, the Playboy bunny trademark, which has been the source of considerable injunctive relief in the Ninth Circuit. What a great contrast between those two trademarks in terms of their history, their nature, and the understanding when people use them.

Let me summarize this way: there is no proof of a willful, deliberate, fraudulent or malicious use of the word "Olympic" by any of the defendants in this case. If that is the standard, and we submit, under the Lanham Act, and the Amateur Sports Act, read harmoniously with it, that that is the standard, it seems to me that the plaintiffs' position about willfulness is not really borne out by the record. They argue in their reply, quote:

> "There can be no dispute that defendants knew from the outset that their use of Olympic designations was prohibited by the Amateur Sports Act. Defendants themselves do not dispute this."

This entire action, the defendant's counterclaims, the arguments made to this Court and on appeal dispute this to the Nth degree. The defendants do not take the position that they knew or could have known from the outset that their use of "Olympic" was prohibited, because indeed the only case decided by any court about the use of the word "Olympic," as of the time that the U.S. Olympic Committee filed suit in August of 1982, was the case *STOP The Olympic Prison versus United States Olympic Committee*, decided by the Federal District Court in New York, and previously cited to this Court.

In that case, a political, philosophical and symbolic use of the word "Olympic" by an organization organized primarily not for profit, like the defendants here, was permitted by court order to use the word "Olympic" in spite of the U.S. Olympic Committee's position. And I note that in the

Ms. Dunlap: *(cont.): "STOP"* case, in dictum, the court said that it — that it read the first amendment as precluding the U.S. Olympic Committee from having the kind of monopolistic control over noncommercial used of the word that the U.S. Olympic Committee there contended it had.

Moreover, the state of the law supported the defendants as of the time the suit was filed, and so did the U.S. Olympic Committee's own behavior.

As of August of 1982, the United States Olympic Committee had never brought suit —

The Court: You're not addressing yourself to the issue of whether or not attorneys' fees should be awarded in this case.

Ms. Dunlap: Yes, I am, your Honor, and —

The Court: No. You're arguing your appeal to the Ninth Circuit.

Ms. Dunlap: Your Honor, all of these things bear on the willfulness of these defendants. The plaintiffs have said to this Court defendants willfully, deliberately, fraudulently, maliciously used the mark. If the state of the law at the time suit was filed upheld their right to use the word, for the uses that they chose, and if the state of the law in terms of the USOC's own behavior toward other users of the word suggested that the U.S. Olympic Committee had no intention of suing any party, then indeed, to turn around and say that these defendants willfully used the mark is a serious twisting of the facts. And so with respect, your Honor, I believe that I am addressing precisely the issue before this court, which is, have the plaintiffs in this case shown that the defendants willfully or deliberately misused the mark given to the U.S. Olympic Committee by Congress.

To continue, the U.S. Olympic Committee, as of August of 1982, had never filed a lawsuit under the —

The Court: That has nothing to do with this issue this morning. We're here to find out whether or not, under the law, they are entitled to attorneys' fees.

Ms. Dunlap: The plaintiffs in this case argue that, quote,

***Ms. Dunlap**: (cont.)*: at page 5 of their reply brief:

> "There can be no doubt that defendants used Olympic designations to lend prestige and credibility to their event."

The record betrays that. The purposes of the defendants using the word "Olympic" are set for the very plainly and unambiguously in the declaration of Dr. Waddell —

***The Court**:* Ms. Dunlap, I'm going to have to ask you to direct yourself to the issues here.

***Ms. Dunlap**:* Your Honor, I'm addressing myself to the issues raised by the reply brief of the plaintiffs in this case. They argue —

***The Court**:* If they raised an irrelevant issue, I'm not going to pay attention to it either.

***Ms. Dunlap**:* All right, your Honor, but it's not irrelevant that they contend that this court can conclude on this record that these people did something on purpose, when in fact the state of the law and the state of the facts supported my clients' actions at the time. Those were the points that I was perhaps belabored in making.

Now, in this case, the suggestion of the plaintiffs throughout both their — both their memorandum in chief and their reply brief is that somehow the defendants in this case went out, took the word "Olympic" knowing it belonged to someone else and misused it for a purpose that violated the Amateur Sports Act. That represents a very severe manipulation of the facts in this case.

When the temporary restraining order was issued by Judge Conti, as the record shows, as declarations by half a dozen people show, these defendants turned around and obediently removed the word "Olympic" from every one of the items that were to be sold by this nonprofit organization in support of these nonprofit activities.

***The Court**:* And subsequently picked up the name "Olympic" again, didn't they?

***Ms. Dunlap**:* The word "Olympic" appears in a newsletter—

The Court: Didn't they?

Ms. Dunlap: —of the games, an entirely nonpromotional, noncommercial context, a matter I contend is entirely protected by the First Amendment, as much as any reporter's story —

The Court: Ms. Dunlap, you are capable of a better argument than you're presenting at this time.

Ms. Dunlap: Your Honor, the argument is this, that the First Amendment plainly entitles anyone to publish an announcement about someone else's Olympics, whether those Olympics are a — are later held by some court to be a trademark infringement or not.

The Court: You aren't arguing the merits of this case, Ms. Dunlap. That's not the issue before this court —

Ms. Dunlap: Well —

The Court: —And we have a courtroom full of attorneys who are waiting to argue their cases, and if you're —

Ms. Dunlap: The Plaintiffs —

The Court: Please — if you're not going to address yourself to the issues before me here, I want to hear the other attorneys.

Ms. Dunlap: As the court knows, it is the plaintiffs' attorney in this case who put before the court the claim that by publising an announcement about the winter, quote, Gay Olympic Games in the midwest, these defendants went into contempt. That was the argument. I'm addressing that point, because, one, it doesn't show willfullness, and two — and two, it was an entirely protected use of the term. Likewise, with the appearance of a photograph of two former U.S. Olympians, who were fully entitled to wear their uniforms at the opening ceremonies of the Gay Games.

At the crux of the motion, and the greatest problem with it here, is that the U.S. Olympic Committee has twisted the facts, ignored the law, swept aside the equities, pushed aside all considerations of public policy, and we submit avoided the constitution, and said, in effect to this court, "We're the U.S. Olympic Committee, please give us what we want." For

Ms. Dunlap: *(cont.):* those reasons, the motion should be denied.

The Court: Thank you. The matter is submitted.

This court does not have to determine whether the standard is the legislative history, as the plaintiff advocates, or the case law developed under the Trademark Act, as the defendant advocates, because even accepting the defendants' standard, it appears that an award of attorneys' fees is appropriate in this case.

Defendants' acts surely can be characterized as deliberate and willful. They were notified in December of 1981 and in January of 1982 that their acts were considered infringing; they nevertheless proceeded with their infringing actions. And they were aware that the USOC would bring an action; yet, they deliberately and willfully continued their course of conduct.

Defendants contended here that their defense was a credible defense, and therefore, an award of attorneys fees would be inappropriate.

The standard, however, is not whether the defense was frivolous or not. The willful or deliberate nature of the defendants' actions, not the quality of the defense, is of concern to the court.

Addressing one of the issues raised by Ms. Dunlap, let me respond by saying that one who violates a statute on the advice of counsel that the statute is unconstitutional has committed no less a willful violation because of their desire to precipitate a so-called test case than any other violator.

I wish to also observe that an award of attorney's fees would also achieve the goals of the Amateur Sports Act. The purpose of that act was to develop, foster and promote amateur athletics in the United States. The goal is frustrated when large amounts of funds are diverted to conduct unnecessary legal action. An award of attorneys' fees would replenish the funds channeled away from the promotion of amateur athletics in the USOC's athletic program.

It is the opinion of the court that the public interest is best

***The Court** (cont.):* served by having the costs necessary for enforcement of the Amateur Sports Act be borne by those who violate that statute. Therefore, the plaintiffs' motion for attorneys' fees is granted in the sum of $96,600.

Madam Clerk, please call the next case.

Mr. Walker: I have an order, your honor.

The Court: Would you prepare the order, if you will, please.

A Spectator: How much did you get?

(Pause in Proceedings.)

The Court: I'm going to ask you to prepare another order embodying the comments the court made —

Mr. Walker: I shall. Thank you, your honor.

The Court: — In open court.

(Proceedings Adjourned.)

(Reporter's certificate omitted in printing.)

File Date: September 21, 1984

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Order issued September 21, 1984

The order of the District Court granting attorneys' fees to plaintiffs is reprinted as Appendix 5, pages 67-76, in the Petition for Certiorari.

(Note: That order is miscaptioned "United States Court of Appeals for the Ninth Circuit." It should be captioned "United States District Court for the Northern District of California.")

File Date: September 28, 1984

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Appeal

NOTICE IS HEREBY GIVEN that defendants and cross-plaintiffs appeal from the Order Granting Plaintiffs' Motion For Award of Attorney Fees filed in this action on September 21, 1984. This notice is filed pursuant to Rules 3(a) and 4(a)(1) of the Federal Rules of Appellate Procedure.

Dated: September 28, 1984

Mary C. Dunlap, (Signed)
Attorney for Defendants
and Cross-plaintiffs

File Date: April 1, 1985

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES
OLYMPIC COMMITTEE, a corporation organized and existing under the laws
of the United States of America,

Plaintiffs/Counter-
Defendants/Appellees,

vs.

SAN FRANCISCO ARTS & ATHLETICS, a
California corporation, and THOMAS P.
WADDELL,

Defendants/Counter-
Plaintiffs/Appellants.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 84-1759
84-2528
84-2713
DC# C82-4183 JPV
Northern California

Order

Before: WALLACE, SCHROEDER and FLETCHER, Circuit Judges

Appellants' motion for a stay of judgment pending appeal is granted. Fed. R. Civ. P 62(g).

Appeal 84-2713 is dismissed as moot. The completion of the judgment debtor's examination mooted appellants' challenge to the scope of that examination.

RE: **International Olympic Committee v. San Francisco Arts & Athletics—Nos. 84-1759, 84-2528, and 84-2713**

WALLACE, Circuit Judge, dissenting:

I dissent from the grant of a stay of judgment pending appeal without any requirement that appellant post a supersedeas bond or other security. The posting of a bond is generally required before a stay of judgment pending appeal may be granted, *see* Fed. R. Civ. P. 62(d); Fed. R. App. P. 8(b), unless the appellant can demonstrate "a present financial ability" to pay the judgment, in which case a court may "substitute some form of guaranty" other than a supersedeas bond. *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). If the posting of a full bond would otherwise "impose an undue financial burden," the court may similarly "fashion some other arrangement for *substitute* security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish *equal* protection to the judgment creditor." *Id.* (emphasis added). Only in "unusual circumstances" should a stay be permitted with only partial or no security, and then only if it will not "unduly endanger the judgment creditor's interest in ultimate recovery." *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 636 F.2d 755, 760-761 (D.C. Cir. 1980).

Appellant in this case fails to make any showing that a bond should be dispensed with entirely on this appeal. Indeed, the Olympic Committee will be left totally unprotected. Even a reduced bond, in light of appellant's dire financial straits, would seriously endanger the Olympic Committee's ability to collect later should it prevail on appeal. The mere fact that the appellant is a non-profit institution hardly requires the invocation of special considerations, particularly in light of the fact that its liability here was based on a finding of willfulness when it clearly sought to profit by trading on the Olympic Committee's goodwill. Granting a stay without any bond or other form of security, solely because the appellant has few assets, turns the requirement of a bond to protect the judgment creditor's interests on its head. I would not stay judgment without a bond.

File Date: January 27, 1986

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Opinion issued January 27, 1986

The opinion of the Court of Appeals, affirming summary judgment and the injunction and reversing and remanding the attorneys' fees award, is reprinted as Appendix 1, pages 1-24, of the Petition for Certiorari.

File Date: May 22, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Order issued May 22, 1986

The Order denying rehearing and amending the opinion issued January 27, 1986, is reprinted as Appendix 2, pages 25-27, of the Petition for Certiorari.

File Date: May 28, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Opinion issued May 28, 1986

The opinion dissenting from denial of *en banc* review is reprinted as Appendix 3, pages 28-59, of the Petition for Certiorari.